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Law Review/Journal	**No**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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August 3, 2023

Honorable Julien Xavier Neals, U.S.D.J.
United States District Court - District of New Jersey
Martin Luther King, Jr. Federal Building and United States Courthouse
50 Walnut Street
Newark, NJ 07102

Dear Judge Neals:

I am a recent graduate of Seton Hall University School of Law, and I am writing to apply for a pro-bono judicial clerkship with Your Honor's chambers for the 2023-2024 term. I am seeking a position as a pro-bono clerk for the United States District Court because I have a passion for justice and a long-standing commitment to public service.

My work experience, moot court participation, and legal writing have prepared me for the requirements of a judicial law clerk. As a law clerk for Sarfaty and Associates I have experience in researching and analyzing opinions as well as editing briefs and motions in advance of filing. I also authored a senior paper discussing the difficulties in applying the guidelines the Supreme Court set forth in *Escobar* when determining material fraud under the False Claims Act. As a research assistant to Professor Richard Winchester, I further developed my research skills concerning the impact of race on tax policy as reflected in judicial opinions. In addition to my familiarity with the judicial process, as intern for PreroLaw, P.C. I gained experience in the transactional setting by analyzing clauses of commercial contracts. I am confident that my research and writing proficiency, coupled with my work experience, will allow me to succeed as your law clerk.

In law school, I thrived on being fully engrossed in the study of law while creating lasting friendships with students from diverse backgrounds. I graduated *Magna Cum Laude*, and received the Law and Technology Award, which primarily represents academic achievement in the field of intellectual property law. My position as President of the Jewish Law Student Association has further developed my teamwork, collaboration, and communication skills. These qualities will allow me to successfully work with a multimember team as a judicial clerk in your chambers.

I have enclosed my resume, writing samples, and transcript for your review. Please contact me if Your Honor requires additional information or documentation. Thank you for your time and consideration.

Respectfully yours,

Eliyahu Prero

Enclosures

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EDUCATION

Seton Hall University School of Law, Newark, NJ
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GPA: 3.863
Class Rank: 14/199 (top 7%)
Honors: Order of the Coif, Excellence in Law & Technology Award, Spring 2023; Excellence in Property Award, Spring 2022; Excellence in Torts Award, Fall 2021; Trustee Scholarship
Activities: Gressman Appellate Moot Court Competition; President, Jewish Law Students Association; Treasurer, Nontraditional Law Student Association.

Hebron College, Jerusalem, Israel
Bachelor of Talmudic Law, May 2003

EXPERIENCE

Sarfaty and Associates, Monsey, NY
Law Clerk, Summer 2022

- Drafted opposition to motion to dismiss complaint regarding arbitral immunity and standard for dismissal.
- Reviewed trial record and edited appellate motion seeking to overturn lower court's ruling extending time for service of process under a 306(b) motion.
- Edited opposition to motion to dismiss personal injury complaint on grounds of municipality's personal jurisdiction.

Seton Hall University School of Law, Newark, NJ
Research Assistant to Professor Richard Winchester, Fall 2022

- Researched tax court cases that determined whether the taxpayer "held property primarily for sale to customers in the ordinary course of his trade or business" under 26 U.S.C. § 1221(a)(1).
- Researched cases involving capital gains similar to *Commissioner v. Pontchartrain Park Homes* and prepared a global comparison of the facts and holdings of those cases to evaluate the impact of race on tax court decisions.

Seton Hall University School of Law, Newark, NJ
Research Assistant to Dean Kathleen Boozang, Spring 2022

- Researched all Master of Science in Law, Master of Jurisprudence, and Master of Legal Studies degrees at law schools throughout the country to identify the subject matter of their various degrees, as well as the most effective web information and pages focused on these degrees and the location of each program.
- Recorded market research in memorandum and discussed findings with school administrators.

PreroLaw, P.C., Chicago, IL
Intern, Summer 2021

- Analyzed forms of purchase and sale agreements for provisions that favor buyer and those that favor seller.
- Researched interim covenants and notice and cure periods of commercial contracts.
- Collaborated with supervising attorney and recommended changes for standard contract forms.

AHS-Genesis Institute, Monsey, NY
College-Level Instructor, October 2005 – June 2020

- Designed and implemented post-secondary courses, including Introduction to Theology, Talmudic Law, Science and Modern Technology.

INTERESTS

- Chicago Cubs, Swimming, Spinning.

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WHEN DOES A MISREPSENTATION BECOME MATERIAL FRAUD?

THE DIFFICULTY IN APPLYING ESCOBAR'S GUIDELINES WHEN DETERMINING MATERIAL FRAUD UNDER THE FALSE CLAIMS ACT

Abstract

According to Escobar, a misrepresentation is more likely to be a material misrepresentation if it goes to "the essence of the bargain" or violates an "express condition of payment." Escobar also held that the government's continued payment of claims after learning of fraud is "very strong evidence" that a misrepresentation was not material. This paper argues that there is room to lessen the impact of the government's continued payment, as many factors influence the government's decision to continue payment despite its knowledge of fraud.

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12.08.2022

Contents

INTRODUCTION

The False Claims Act (FCA) imposes civil liability on "any person who knowingly presents … a false or fraudulent claim for payment or approval to the federal government."[1] For example, one who bills the government for services never provided would be civilly liable under the FCA.[2] Despite the statue's plain language which implies that any false claim would trigger liability, the Supreme Court has held that there must be more. In *Escobar,* the Court held that the word "fraudulent" in the FCA statute should be understood according to its common law meaning which defines fraud not only as misrepresentation, but as *material* misrepresentation. [3] Consequently, one who submits a false claim for payment from the government will only be held liable under the FCA if the fraud is "*material*."[4] *Escobar* maintained that the material standard is both "rigorous" and "demanding."[5]

According to *Escobar*, a misrepresentation is more likely to be considered *material* if it goes to "the essence of the bargain" or violates an "express condition of payment."[6] *Escobar* also held that the government's continued payment of claims after learning of fraud is "very strong evidence" that a misrepresentation was *not* material.[7] This paper argues that there is room to lessen the impact of the government's continued payment, as many factors influence the government's decision to continue payment despite its knowledge of fraud.

[1] 37 U.S.C. § 3729(a)(1)(A).
[2] Deborah R. Farringer, *From Guns That Do Not Shoot to Foreign Staplers: Has the Supreme Court's Materiality Standard under Escobar Provided Clarity for the Health Care Industry about Fraud under the False Claims Act*, 83 BROOK. L. REV. 1227, 1228 (2018).
[3] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 193 (2016) (stating "the common law could not have conceived of 'fraud' without proof of materiality").
[4] *Id.*
[5] *Id.* at 192-93.
[6] *Id.* at 193-94.
[7] *Id*. at 194

Part I of this paper will provide a general background of the FCA. Part II will explain how the FCA applies to a wide variety of fraud against the government. Part III will discuss *Escobar's* holding. Part IV will analyze the materiality of fraudulent misrepresentation as courts have applied it to other legal contexts, including contracts, torts, immigration, perjury, and wire fraud. Part V will explain the guidelines *Escobar* set forth in determining materiality in the context of the FCA. Part VI will argue that when assessing materiality under *Escobar*, there is room for courts to lessen the impact of the government's continuing to pay claims despite its knowledge of a practitioner's fraud, especially relating to health care fraud. Part VII states this paper's conclusion.

I. The False Claims Act: A General Background

1. The False Claims Act and Material Fraud

Congress enacted the False Claims Act (FCA) in 1863 in response to massive frauds perpetrated by defense contractors during the American Civil War.[8] A series of Congressional investigations revealed that defense contractors had defrauded the Union Army through practices such as selling sawdust instead of gun powder and pressed rags that would disintegrate after being exposed to rain, instead of conventional military grade uniforms.[9] Congress responded by imposing civil and criminal liability for several types of fraud perpetuated on the government, subjecting violators to double damages, forfeiture, and possible imprisonment.[10] Today, the FCA's focus remains on those who present false or fraudulent claims to the government.[11]

[8] United States v. Bornstein, 423 U.S. 303, 309 (1976).
[9] United States v. McNinch, 356 U.S. 595, 599 (1958) ("The FCA was originally adopted following a series of sensational Congressional investigations prompted hearings where witnesses painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war."); Farringer, *supra* note 2, at 1227.
[10] Universal Health Servs., Inc. v. United States *ex rel*. Escobar, 579 U.S. 176, 182 (2016).
[11] United States *ex rel*. Janssen v. Lawrence Mem'l Hosp., 949 F.3d 533, 540 (10th Cir.), cert. denied, 141 S. Ct. 376 (2020).

In addition to allowing the United States to pursue perpetrators of fraud on its own, the FCA allows private citizens to file suits on behalf of the government (called "qui tam" suits) against those who have defrauded the government.[12] Private citizens, known as "relators," who successfully bring qui tam actions may receive a portion of the government's recovery.[13] Many government investigations and lawsuits arise from qui tam actions.[14]

2. False Claims Act Monetary Impact

The government has obtained billions of dollars in settlements and judgments from civil cases involving fraud and false claims against the government.[15] Originally, the FCA provided that any person who knowingly submitted false claims to the government was liable for double the government's damages plus a penalty of $2,000 for each false claim.[16] Over the years, Congress has amended the FCA several times and now provides that violators are liable for treble damages

[12] 31 U.S.C. § 3730(b); United States v. Eli Lilly & Co., Inc., 4 F.4th 255, 262 (5th Cir. 2021) (explaining that 31 U.S.C. § 3730(b) "authorizes individuals—relators—to bring qui tam lawsuits alleging a 'false or fraudulent claim' for payment from the United States.").

[13] 31 U.S.C. § 3730(d) (stating that a relator may "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim."); *See Eli Lilly*, 4 F. 4th at 262; *see also* Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 ALA. L. REV. 57, 57–58 (1999) ("Qui tam comes from the Latin phrase "qui tam pro domino rege quam pro si ipso in hac parte sequitur," which means he "who sues on behalf of the King as well as for himself."); *see also* Press Release, U.S. Dep't of Just., Biogen Inc. Agrees to Pay $900 Million to Settle Allegations Related to Improper Physician Payments (September 26, 2022) https://www.justice.gov/opa/pr/biogen-inc-agrees-pay-900-million-settle-allegations-related-improper-physician-payments#:~:text=The%20settlement%20announced%20today%20resolves,United%20States%20and%20receive%20a (reporting that a former employee, Michael Bawduniak, filed a qui tam lawsuit as a relator on behalf of the United States against his former employer Biogen which settled for $900 million).

[14] Press Release, U.S. Dep't of Just., Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021 (February 1, 2022) [hereinafter DOJ Feb. 1, 2022 Press Release], https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year (stating "[t]hese whistleblower, or qui tam, actions comprise a significant percentage of the False Claims Act cases that are filed.").

[15] DOJ February 1, 2022 Press Release, *supra* note 14 ("In the fiscal year ending Sept. 30, 2021, the Department of Justice obtained more than $5.6 billion in settlements and judgments from civil cases involving fraud and false claims against the Government. Settlement and judgments since 1986 … total more than $70 billion.").

[16] U.S. Dep't of Just., The False Claims Act (February 2, 2022), https://www.justice.gov/civil/false-claims-act; U. S. *ex rel*. Marcus v. Hess, 317 U.S. 537, 540, (1943) (stating Section 3490 of the original Act of March 2, 1863 separately provided that "whoever commits 'any' of the prohibited acts shall 'forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages").

plus a penalty that is linked to inflation.[17] Currently, the minimum penalty for a single FCA violation is set at above $10,000, with the maximum penalty above $20,000.[18] Accordingly, when including penalties and treble damages, a final judgment may be much greater than the amount a defendant illegal gained by fraud.[19]

3. False Claims Act and Health Care Fraud

The FCA is the government's primary tool in in enforcing health care fraud.[20] While the "lion's share" of FCA settlements and judgments originate in the field of health care, fraud against the government occurs in a wide range of industries.[21] Of the more than $5.6 billion in settlements and judgments reported by the Department of Justice (DOJ) in 2021, over $5 billion relates to matters that involved the health care industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories and physicians.[22] According to the DOJ, vigorous pursuit of the FCA protects patients from medically unnecessary

[17] *Id.*
[18] 28 C.F.R. § 85.3(a)(9).
[19] *E.g.*, States *ex rel*. Carmichael v. Gregory, 270 F. Supp. 3d 67, 69 (D.D.C. 2017) (entering a default judgment for the United States for the total amount of $587,999.00, consisting of $246,999.00 in treble damages and $341,000.00 in civil penalties, against a landlord who, for a period of approximately five years, charged a tenant $100 more per month than the limit allowed by the D.C. Housing Authority, while obtaining sixty-two payments of federal funds through a program made available by the U.S. Department of Housing and Urban Development totaling $82,333.); *see* Press Release, U.S. Dep't of Just., GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data Largest Health Care Fraud Settlement in U.S. History (July 2, 2012) [hereinafter GlaxoSmithKline $3 billion settlement], https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report (explaining that under the terms of the plea agreement GlaxoSmithKline will pay forfeiture in the amount of $43,185,600, $2 billion to resolve its civil liabilities under the FCA, and a $1 billion criminal fine).
[20] *E.g.*, Jacob T. Elberg, *Health Care Fraud Means Never Having to Say You're Sorry*, 96 Wash. L. REV. 371, 377 (2021).
[21] *See e.g.*, DOJ Feb. 1, 2022 Press Release, *supra* note 14 (explaining that outside of health care, other fraudulent activities pursued by the DOJ includes defense contracting, fraudulent leasing of federal lands, small business fraudulently receiving Paycheck Protection Program (PPP) which Congress authorized in response to the COVID-19 pandemic, garment industry companies fraudulently underpaying custom duties owed to the United States, a charter school management company engaging in non-competitive bidding practices, and a private education program who fraudulently obtained federal funds for tutoring services that it never provided.).
[22] DOJ Feb. 1, 2022 Press Release, *supra* note 14.

or potentially harmful actions and prevents billions more in losses by deterring others who might try to cheat the system for their own gain.[23]

II. Applying the FCA to Modern Fraud Against the Government

1. Providing Gun Powder Instead of Sawdust: "Factually False Claim"

Congress originally employed the FCA to combat vendors who provided substandard or nonexistent products to the government.[24] Congress continued to utilize the FCA for over a century as its primary vehicle to combat and recover fraud.[25] In the FCA's original context, a contractor violated the FCA by submitted a bill to the government for providing gunpowder, while only providing sawdust—a "*factually-false* claim."[26] As government contracting expanded and became more nuanced, so did the claims of fraud against the government.[27] Accordingly, pre-*Escobar*, some circuits held that a contractor violated the FCA by submitting a "*factually-true* claim" that was "legally false."[28]

2. What is a "Factually True but Legally False" Claim?

Two hypotheticals will shed light on the distinction between a "factually true but legally false" claim.

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[23] *Id*.
[24] United States *ex rel*. Janssen v. Lawrence Mem'l Hosp., 949 F.3d 533, 540 (10th Cir.), cert. denied, 141 S. Ct. 376 (2020).
[25] Isaac D. Buck, *A Farewell to Falsity Shifting Standards in Medicare Fraud Enforcement*, 49 Seton Hall L. Rev. 1, 6 (2018) (stating "the federal government continues to lean on the FCA to provide the balance of fraud recoveries").
[26] Farringer, *supra* note 2, at 1228.
[27] Farringer, *supra* note 2, at 1228; *see also* Press Release, U.S. Dep't of Just., Justice Department Recovers over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (Dec. 21, 2018) [hereinafter DOJ Dec. 21, 2018 Press Release], https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018 (equating fraud perpetrated by military contractors during the Civil War to current FCA violations which are "a modern version of the same thing—deceptive and fraudulent practices directed at the U.S. government and the American taxpayer").
[28] Farringer, *supra* note 2, at 1242.

Hypothetical one: A defense contractor provided real gunpowder to the government, and a government regulation required that the defense contractor appoint a special supervisor to certify the quality of the gunpowder *before* it was placed into a barrel. In practice, however, the certification took place only *after* the manufacturer placed the gunpowder in the barrel.[29] Although the contractor provided actual gunpowder, by submitting a claim to the government for payment, the contractor implied compliance with *all* government regulations.[30] Hence, the claim for payment for the gunpowder provided would be "factually true," but "legally false." Some courts held such a practice violated the FCA and called it the "implied false certification theory."[31]

Hypothetical two: A government regulation e*xpressly designated a provision as a condition of payment* stating that the government will *only* pay for gunpowder if it is certified *before* it is placed in the barrel.[32] In practice, however, the contractor certified the gunpower only *after* it was placed in the barrel, and then submitted a bill to the government demanding payment for the gunpowder, while expressly certifying the gunpowder was certified before it was placed in

[29] *See* United States *ex rel*. Prather v. Brookdale Senior Living Cmtys., Inc., 838 F.3d 750, 758-59 (6th Cir. 2016) (attaching the implied false certification theory to a provider who improperly provided home health services prior to physician's certification in violation of health care regulations).
[30] *See* United States *ex rel*. Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1218 (10th Cir. 2008) ("Under an implied false certification theory, by contrast, courts do not look to the contractor's actual statements; rather, the analysis focuses on the underlying contracts, statutes, or regulations themselves to ascertain whether they make compliance a prerequisite to the government's payment.").
[31] *See, e.g.*, *Prather*, 838 F.3d at 761 (remarking that the theory of liability known as "the implied false certification theory" can be a basis for liability if a defendant submits a claim but omits its violations of statutory, regulatory, or contractual requirements that render the defendant's representations misleading with respect to the goods or services provided); *id.* ("[B]y certifying a claim to the government for payment, a defendant implies compliance with all relevant regulations, statutes, and contractual obligations.").
[32] *See* e.g., Mikes v. Straus, 274 F.3d 687, 698 (2d Cir. 2001), abrogated by Universal Health Servs., Inc. v. United States *ex rel*. Escobar, 579 U.S. 176 (2016) ("An expressly false claim is, as the term suggests, a claim that falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment.").

the barrel. Prior to *Escobar*, some courts held a "legally false" misrepresentation would attach liability under the FCA only if the defendant misrepresented an express condition of payment.[33]

Prior to *Escobar*, some circuits adopted the implied false certification theory wholesale.[34] Other circuits, however, limited its application to cases where defendants failed to disclose violations of expressly designated conditions of payment.[35] In contrast, the Seventh Circuit rejected the implied false certification theory outright.[36]

3. *Prather*: Factually True, But Legally False Due to Late Certification

United States ex rel. Prather v. Brookdale Senior Living is a prime example of the "implied false implication theory."[37] In *Prather*, a registered nurse noticed that the required certifications from a doctor stating that the doctor had decided that the patient needed home-health services, established a plan of care, and met with the patient face-to-face, were signed *well after* the care had been provided.[38] In a qui tam suit, the nurse filed suit on behalf of the government claiming that the health care provider submitted false Medicare claims to the government.[39] The court noted that Medicare regulations required that "the certification of need for home health services must be obtained at the time the plan of care is established or as soon thereafter as possible."[40] Although

[33] *Id.* at 697 ("We join the Fourth, Fifth, Ninth, and District of Columbia Circuits in ruling that a claim under the Act is legally false only where a party certifies compliance with a statute or regulation as a condition to governmental payment.").
[34] Farringer, *supra* note 2 at 1240-1241; *See* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010) (holding conditions of payment need not be expressly designated as such to be a basis for FCA liability).
[35] *See e.g.*, *Mikes*, 274 F.3d at 700.
[36] *See e.g.*, United States v. Sanford-Brown, Ltd., 788 F.3d 696, 711–12 (7th Cir. 2015) ("[a]lthough a number of other circuits have adopted this so-called doctrine of implied false certification … we decline to join them."); Luckey v. Baxter Healthcare Corp., 2 F. Supp. 2d 1034, 1045 (N.D. Ill. 1998), aff'd, 183 F.3d 730 (7th Cir. 1999) (explaining that a finding of a false implied certification under the FCA for every request for payment accompanied by a failure to comply with all applicable regulations, without more, would improperly broaden the intended reach of the FCA, and asserting that "the key inquiry is whether the 'claim' in question has the practical purpose and effect, and poses the attendant risk, of inducing wrongful payment").
[37] See United States *ex rel*. Prather v. Brookdale Senior Living Cmtys., Inc., 838 F.3d 750, 761 (6th Cir. 2016).
[38] *Id*.
[39] *Id*. at 759.
[40] *Id*. at 761 (citing 42 C.F.R. § 424.22(a)(2)).

the Medicare regulations allowed some delay in obtaining the physician's certification of need after the plan of care is established, the Sixth Circuit ruled the home health-care provider violated the FCA, reasoning that the provider did not certify the requests for anticipated payment within the timeline stipulated by the regulations. [41]

Prather is a prime example of a "factually true claim." The court in *Prather* did not question the quality of, or the need for, the health care service provided. It is reasonable to assume that the home health care practitioner provided quality and necessary services to a patient who required the care. Pre-*Escobar* some circuits held such an evaluation was irrelevant. Rather, a "legal falsity" arose because the provider did not comply with a regulation—and the provider's submission of a claim falsely implied that the claimant complied with the all the terms of the contract with the government.[42]

III. ESCOBAR

1. Factual and Procedural History of *Escobar*

In *Universal Health Servs., Inc. v. United States ex el. Julio Escobar* (*Escobar*), a teenage beneficiary of Massachusetts Medicaid program received counseling services for several years at mental health facility that was a subsidiary of Universal Health Services.[43] She suffered an adverse reaction to a medication that a purported doctor prescribed after diagnosing her with bipolar disorder and eventually died of a seizure.[44] Her parents later discovered that the practitioner who diagnosed their daughter as bipolar identified herself as a psychologist with a Ph.D., but failed to mention that her degree came from an unaccredited Internet college and that Massachusetts had

[41] *Id.* at 775.
[42] Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001).
[43] Universal Health Servs., Inc. v. United States, *ex rel.* Escobar, 579 U.S. 176, 176 (2016).
[44] *Id.*

rejected her application for licensure.[45] Similarly, the practitioner who prescribed medicine to their daughter and who professed to be a psychiatrist, was in fact a nurse who lacked authority to prescribe medications without supervision.[46] In its correspondence with the federal government, Universal Health misrepresented the qualifications and licensing status of its practitioners at that facility to obtain National Provider Identification numbers, which are submitted in connection with Medicaid reimbursement claims and correspond to specific job titles.[47] Consequently, when submitting reimbursement claims from the government, Universal Health misrepresented the services its staff provided.[48]

The question before the Court was whether Universal Health violated the FCA by submitting fraudulent claims for payment to the federal government for providing health care services when the government regulations did not expressly condition payment on Universal Health using licensed practitioners?[49]

2. *Escobar*: Fraud Requires "Materiality"

The Court answered: Yes, and No. First, *Escobar* held that FCA liability can attach under an implied false certification theory of liability.[50] However, the Court also held that not every false misrepresentation due to implied certification renders that claim "fraudulent."[51] Fraud requires "materiality."[52] In other words, material fraud is a prerequisite for an FCA violation. Consequently, since materiality is a *sine qua non* for fraud, even if a health care provider violated an express

[45] *Id.* at 183.
[46] *Id.*
[47] *Id.*
[48] Universal Health Servs., Inc. v. United States *ex rel*. Escobar, 579 U.S. 176, 184 (2016).
[49] *Id*. at 186.
[50] *Id.* ("We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability.").
[51] *Id.* at 187.
[52] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 187 (2016).

condition of payment, if the misrepresentation was not "material fraud," the provider did not violate the FCA.[53] *Escobar* stated, "What matters is not the label the government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is *material* to the government's payment decision."[54]

The Court explained that the FCA imposes civil liability on "any person who ... knowingly presents…a false or fraudulent claim for payment or approval."[55] A "claim" includes direct requests to the government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs.[56] Congress did not define what makes a claim "false" or "fraudulent," but it is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common law terms it uses.[57] And to be actionable at common law, fraudulent misrepresentation must be "material."[58]

[53] *Id.* at 194, ("when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive.").
[54] *Id.* at 181. It is noteworthy that the Court's conclusion differs from the briefs of the United States, Universal Health, and the Respondents. While both the United States and Universal Health agreed that materiality was an essential element of an FCA violation, the United States asserted that one may establish material fraud by demonstrating a false implied certification. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 10, Universal Health Services, Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176 (2016) (No. 15-7), 2016 WL 1554735, at *10 ("Petitioner's alternative argument - that an implied misrepresentation can serve as the basis for FCA liability only if it concerns a matter that is expressly identified as a condition of payment - is similarly without merit."). Universal Health, however, asserted that materiality would only realize when a contractor misrepresented an express condition of payment. Reply Brief for the Petitioner at 17, Universal Health Services, Inc. v. United States *ex rel*. Escobar 579 U.S. 176 (2016) (No. 15-7), 2016 WL 1213268 at *17 ("Any theory of implied certification must rest on noncompliance with an expressly stated condition of payment."). While the Respondents discussed materiality as a requirement for fraud, they concluded that it "would be inappropriate to invoke any limitations of common-law fraud to restrict the FCA." Brief for Respondents at 27, Universal Health Services, Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176 (2016) (No. 15-7), 2016 WL 750226 at *27.
[55] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 182 (2016).
[56] *Id*.
[57] *Id.* at 187.
[58] *Id.* at 188.

3. The Demanding Materiality Standard

Escobar maintained that materiality in the context of the FCA is "rigorous" and "demanding," as Congress intended the FCA to combat fraud, not to punish "garden-variety breaches of contract or regulatory violations."[59] Similarly, the Seventh Circuit had previously stated, "[t]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations."[60]

4. Implied False Certification and Express Payment Condition Do Not Necessarily Render a Misrepresentation Fraudulent

A misrepresentation may not violate the FCA even though every submitted claim impliedly certifies compliance with all conditions of payment.[61] As noted above, implied compliance where there is none does not violate the FCA unless the misrepresentation is material.[62] Accordingly, if a defendant submitted a claim for payment, and failed to disclose a violation of a *non-material* statutory, regulatory, or contractual requirement, the defendant has not made a misrepresentation that renders the claim "false or fraudulent" under the FCA. Additionally, a misrepresentation cannot be deemed material merely because the government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment.[63]

In *Escobar*, the fact that federal regulations required a "licensed health care professional" to provide care did not conclusively determine that Universal Health violated the FCA by misrepresenting its practitioners, absent the determination that such a misrepresentation was "material" to the service provided.[64] The government alleged that Universal Health misrepresented

[59] *Id.* at 194 (citing Allison Engine Co. v. U.S. *ex rel*. Sanders, 553 U.S. 662, 672 (2008)).
[60] U.S. *ex rel*. Lamers v. City of Green Bay, 168 F.3d 1013, 1020 (7th Cir. 1999)).
[61] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 194 (2016).
[62] *Id.* ("Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance.").
[63] *Id.* at 194.
[64] *Id.* at 196.

its compliance with mental health facility requirements that are so central to the provision of mental health counseling that the Medicaid program would not have paid these claims had it known of these violations. [65] *Escobar* remanded to the lower courts to determine if the Universal Health's misrepresentation was material.[66]

5. When Does a Misrepresentation Become "Material" Fraud?

Escobar provided several guidelines for determining materiality under the common law. A misrepresentation certainly becomes "material" when the government would not have paid for the goods or services had it known the truth about the contractor's misrepresentation.[67] A misrepresentation is also material if it "went to the very essence of the bargain."[68] The FCA, however, defines material as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[69] *Escobar* remarked, that while the common law definition of materiality may differ from the statutory definition of materiality, under any understanding of the concept, materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[70]

IV THE COMMON LAW DEFINITION OF FRAUD

[65] *Id.*
[66] *Id.*
[67] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 194 (2016) (citing United States *ex rel*. Marcus v. Hess, 317 U.S. 537, 543 (1943)).
[68] *Escobar*, 579 U.S. at 193 n.5 (citing Junius Constr. Corp. v. Cohen, 178 N.E. 672, 674 (1931); *see also* United States *ex rel*. Yu v. Grifols USA, LLC, No. 22-107, 2022 WL 7785044, at *5 (2d Cir. Oct. 14, 2022) ("In short, because Yu does not point to anything to suggest that Grifols' alleged violations have resulted in significant financial cost to the government, or demonstrate that the violations go to the "heart of the bargain," this factor weighs against a finding of materiality.").
[69] *Escobar*, 579 U.S. at 192 (first citing 31 U.S.C. § 3729(b)(4) and then citing Kungys v. United States, 485 U.S. 759, 769 (1988) (stating that the statutory definition of materiality descends from "common law antecedents.")).
[70] *Escobar*, 579 U.S. at 193 (citing 26 R. Lord, WILLISTON ON CONTRACTS § 69:12 (4th ed. 2003) [hereinafter Williston]).

1. To Define Materiality, *Escobar* Drew Upon a Wide Variety of Cases and Treatises

Escobar turned to three treatises and four cases in its effort to define material fraud. The sources spanned a wide range of factual circumstances and legal issues, but all involved the central query: when does a misrepresentation become a *material* misrepresentation. *Escobar* is not the first Court to draw on many influences to define materiality. As Justice Scalia wrote "federal courts have long displayed a quite uniform understanding of the 'materiality' concept as embodied in statutes dealing with willful misrepresentation to government officials."[71]

The treatises that *Escobar* cites include: (1) Williston on Contracts, (2) Restatement (Second) of Torts, and (3) Restatement (Second) of Contracts. [72] The four cases describe materiality in other contexts: (1) *Kungys v. United States* (immigration fraud), (2) *Neder v. United States* (tax, wire, mail, and bank fraud), (3) *United States ex rel. Marcus v. Hess* (fraud in government contracting), and (4) *Junius Construction v. Cohen* (contract fraud).[73] To provide a better understanding of materiality in other contexts, this paper will endeavor to explain, among other cases, *BMW v. Gore* (contract/tort fraud), *Fedorenko v. United States* (immigration fraud), and *TSC Indus., Inc. v. Northway, Inc.* (securities fraud).[74]

[71] Kungys v. United States, 485 U.S. 759, 769–70 (1988) (citing a wide variety of sources to explain material misrepresentation to immigration officials).
[72] Williston, *supra* note 70; RESTATEMENT (SECOND) OF TORTS § 538 (Am. L. Inst. 1977) [hereinafter Restatement of Torts]; RESTATEMENT (SECOND) OF CONTRACTS § 162 (Am. L. Inst. 1981) [hereinafter Restatement of Contracts].
[73] Kungys v. United States, 485 U.S. 759 (1988); Neder v. United States, 527 U.S. 1 (1999); U. S. *ex rel*. Marcus v. Hess, 317 U.S. 537 (1943) (electrical contractors' misrepresentation that they satisfied a non-collusive bidding requirement for Federal program contracts violated the False Claims Act because "[t]he Government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive"); Junius Const. Corp. v. Cohen 178 N.E. 672, 672 (1931).
[74] BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Fedorenko v. United States, 449 U.S. 490 (1981); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (explaining that the proxy rules promulgated under the Securities Exchange Act of 1934 bar the use of proxy statements that are false or misleading with respect to the presentation or omission of *material* facts and concluding that a fact is material in a proxy statement "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote").

2. The Dictionary Definition vs. The Common Law Definition of "Fraud"

The second edition of Black's Law Dictionary (1910) defines fraud as "some deceitful practice or willful device, resorted to with intent to deprive another of his right."[75] Webster's dictionary defines fraud as: "deceit, trickery. Specifically: intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right."[76] In contrast, the common law definition adds that in order for fraud to be actionable at common law, the "deceitful practice resorted to with intent to deprive another" must be "*material*."[77] This begs the question: since "materiality" is the difference between "dictionary fraud" and "common law fraud," what is "material?"

3. Restatement (Second) of Torts' Examples of Materiality

Before stating the Restatement's definition of common law fraud, it may help to explain materiality by way of the Restatement's two helpful illustrations:

> 1. A, seeking to induce B to buy stock in a corporation, knows that B believes in astrology and governs his conduct according to horoscopes. A fraudulently tells B that the horoscopes of the officers of the corporation all indicate remarkable success for the corporation during the coming year. In reliance upon this statement, B buys the stock from A and as a result suffers pecuniary loss. The misrepresentation is material.
>
> 2. A, seeking to induce B to give money to a college about to be founded, fraudulently informs B that it is to be named after X, a deceased friend of B of bad character, whom B has regarded with great affection. A knows that the statement is likely to be regarded

[75] *Fraud*, THE LAW DICTIONARY, https://thelawdictionary.org/fraud/ (last visited Nov. 27, 2022).
[76] *Fraud*, MIRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/fraud (last visited Nov. 27, 2022).
[77] *Escobar*, 579 U.S. at 192; *Fraud*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining fraud as "[a] knowing misrepresentation or knowing concealment of a *material* fact made to induce another to act to his or her detriment") (emphasis added).

> by B as an important inducement to make a gift. In reliance upon the statement, B makes the gift. The statement is material."[78]

4. The Restatements' Definition of Materiality

The Restatement (Second) of Torts states that a matter is material if:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
>
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.[79]

Similarly, the Restatement (Second) of Contracts explains that "a misrepresentation is material only if it would likely induce a reasonable person to manifest his assent or the defendant knows that for some special reason the representation is likely to induce the particular recipient to manifest his assent to the transaction."[80]

5. Williston on Contracts

Williston explains that under the common law, a misrepresentation is material if it concerns a matter to which a reasonable person would attach importance in determining his or her choice of action with respect to the transaction involved.[81] The misrepresentation must be one which will induce action by a complaining party and knowledge of which would have induced the recipient to act differently.[82]

[78] Restatement of Torts, *supra* note 72.
[79] Restatement of Torts, *supra* note 72.
[80] Restatement of Contracts, *supra* note 72.
[81] Williston, *supra* note 72.
[82] Williston, *supra* note 72.

6. Materiality in Contract Fraud

    a. *Junius Construction v. Cohen*: Material fraud goes to the "Essence of the Bargain"

Escobar first cited Judge Cardozo's opinion in *Junius Construction* as a prime example of material fraud which met the "rigorous and demanding standard." [83] *Escobar* also cited *Junius Construction* in footnote five providing a case which illustrated the standard for materiality set by the Restatement (Second) of Contracts.[84]

Written in 1931, *Junius* described a seller who contracted to sell a parcel of land in Queens, New York.[85] The seller informed the buyer that, based on a municipal map, the city was planning to open two roads on either side of the parcel.[86] However, the seller failed to mention that the same map indicated that the city planned to open a third street which would bisect the parcel, rendering the ability to erect a factory on that parcel moot.[87] The buyer had wished to build a factory on that parcel.[88] Writing for a unanimous Court of Appeals, Judge Cardozo explained that by omitting the city's plan to open a third street the seller misrepresented the property.[89] He reasoned, "[t]he enumeration of two streets, described as unopened but projected, was a tacit representation that the land to be conveyed was subject to no others, and certainly subject to no others materially affecting the value of the purchase."[90] Further, Justice Cardozo explained that the misrepresentation to a risk so vital went to the "*very essence of the bargain*."[91] On that basis, the

[83] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 194 (2016).
[84] *Id.* at 193 n.5.
[85] Junius Const. Corp. v. Cohen 178 N.E. 672, 672 (1931).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 674.
[90] *Id.* (asserting that the seller was "not at liberty in good conscience to list among the incumbrances the two unopened streets, which, even if unopened would leave the value unimpaired, and while listing these, suppress the existence of a third unopened street, which if opened would destroy the value for the use intended by the buyer").
[91] Junius Const. Corp. v. Cohen 178 N.E. 672, 674 (1931).

court ruled that the misrepresentation sustained the rescission of the contract and did not require the buyer to purchase the parcel of land.[92]

Escobar found this particular line from *Junius* instructive, "[n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood that its factory, when built, would be bisected by a street, to say nothing of the possibility that a permit to build would be denied altogether."[93]

b. *BMW v. Gore*: Minor Imperfections Are Likely Not *Material* Omissions

In January 1990, Dr. Ira Gore purchased a sports sedan for $40,750.88 from an authorized BMW dealer in Birmingham, Alabama.[94] After driving the car for nine months without noticing any flaws, an independent auto detailer informed Dr. Gore that the car had been repainted.[95] Dr. Gore sued BMW for both compensatory and punitive damages.[96] Dr. Gore asserted that his repainted car was worth $4,000 less than a car that had not been refinished and that BMW's failure to disclose that the car had been repainted constituted suppression of a *material* fact.[97]

BMW asserted that it adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation.[98] According to its policy, if the repair cost did not exceed 3 percent of the car's suggested retail price, the car was sold as new without advising the

[92] *Id.*
[93] *Id.*; *see* Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 178 (2016) (explaining *Junius'* holding as "an undisclosed fact was material because '[n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood' of the undisclosed fact").
[94] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563 (1996).
[95] *Id.*
[96] *Id.*
[97] *Id.* at n.3 (asserting BMW violated an Alabama statute which provides "[s]uppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.").
[98] *Id.* at 563.

dealer that any repairs had been made.[99] Since the $601.37 cost of repainting was only about 1.5 percent, BMW did not disclose the damage or repair.[100] Additionally, BMW maintained that Dr. Gore's car was as good as a car with the original factory finish.[101]

The trial court awarded Dr. Gore $4,000 in damages, and $4,000,000 in punitive damages, which the Alabama Supreme Court reduced to $2,000,000.[102] Before the Supreme Court, Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983.[103] Additionally, Dr. Gore asserted that the court should treat BMW as a repeat criminal ("recidivist"), which would make punitive damages more appropriate, as the company should have anticipated that its actions would be considered fraudulent in not only Alabama, but in all jurisdictions as well.[104]

The Court rejected Gore's assertion that BMW's policy would be considered fraudulent in all jurisdictions.[105] The Court cited Restatement (Second) of Torts which stated that actionable fraud requires a *material* misrepresentation or omission.[106] The Court stated, "[w]e do not think it can be disputed that there may exist minor imperfections in the finish of a new car that can be repaired (or indeed, left unrepaired) without *materially* affecting the car's value."[107] Consequently the Court concluded that there was no evidence that BMW acted in bad faith when it sought to

[99] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563-564 (1996).
[100] *Id.* at 564.
[101] *Id.*
[102] *Id.* at 565, 567.
[103] *Id.* at 576.
[104] *Id.* at 579.
[105] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 579 (1996).
[106] *Id.* at n.29 (citing Restatement of Torts, *supra* note 72).
[107] *Id.* at 579; *see id*. at n.30 (remarking that even the Alabama Supreme Court has held that a car may be considered "new" as a matter of law even if its finish contains minor cosmetic flaws).

establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers.[108]

c. A Summary of Materiality in Contract Fraud

In sum, to be actionable at common law, an omission or misrepresentation must be material. In *Junius*, a street that potentially bisected a lot in Queens was considered a material omission that sustained the recission of contract. Conversely, in *BMW v. Gore*, a minor imperfection in a new BMW that was repainted at the factory was not necessarily considered material.

7. Material Misrepresentation in Immigration

In *Kungys v. United States* the Court explained that the most common formulation of materiality is that a misrepresentation is material if it has a natural tendency to influence the decision of the decisionmaking body to which it was addressed.[109]

a. *Kungys v. United States*: A Lithuanian Immigrant's Misrepresentation of his Date and Place of Birth was not *Material* Misrepresentation

In 1947, Jouzas Kungys applied for an immigration visa in Stuttgart, Germany.[110] In 1948, the visa was issued.[111] He came to the United States, where he was naturalized as a citizen in 1954.[112] In 1982, the United States, acting through the Office of Special Investigations of the Department of Justice, filed a complaint pursuant to the Immigration and Nationality Act (INA) to denaturalize him.[113]

[108] *Id.* at 579.
[109] Kungys v. United States, 485 U.S. 759, 770 (1988).
[110] *Id.* at 764.
[111] *Id.*
[112] *Id.*
[113] *Id.*

The INA provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization "were illegally procured or were procured by concealment of a *material fact* or by willful misrepresentation."[114]

The United States attempted to show that Kungys had participated in executing over 2,000 Jewish Lithuanian civilians in Kedainiai, Lithuania between July and August 1941.[115] To prove this claim, the United States offered three videotaped depositions taken for use in this case in the Soviet Union.[116] In the depositions, eye-witnesses testified that Kungys took an active role in the massacres.[117] The District Court determined that the Soviet depositions were unreliable and did not admit them into evidence.[118] Consequently, based on the evidence actually admitted, the District Court could not determine that Kungys played an active role in the atrocities.[119] However, the District Court found, and the Third Circuit upheld the finding, that Kungys misrepresented, in both his visa application and in subsequent interviews with immigration officials, his: (1) date and place of birth, (2) wartime occupation, and (3) location during the Kedainiai massacres.[120] However, the District Court held those misrepresentations were *not* material within the meaning of the INA.[121]

[114] *Id.* (citing 8 U.S.C. § 1451(a)).
[115] Kungys v. United States, 485 U.S. 759, 764 (1988).
[116] *Id.*
[117] *Id.*
[118] *Id.; see* United States v. Kungys, 571 F. Supp. 1104, 1132 (D.N.J. 1983) (finding the three videotaped depositions to be unreliable largely because they were taken in the Soviet Union, which (1) "has a strong state interest" in this case, and (2) which "on occasion distorts or fabricates evidence in cases such as this involving an important state interest," and (3) because these depositions "were conducted in a manner which made it impossible to determine if the testimony had been influenced improperly by Soviet authorities").
[119] Kungys v. United States, 485 U.S. 759, 765 (1988).
[120] *Id.*
[121] *Id.*

Writing for the majority, Justice Scalia concluded that Kungys' misrepresentations were not material within the meaning of the INA.[122] The Court explained that the most common formulation that a concealment or misrepresentation is material if it has a natural tendency to influence the decisionmaking body to which it was addressed.[123] In the naturalization context, as elsewhere, the central object of the inquiry is: whether the misrepresentation or concealment was *predictably capable of affecting*, i.e., had a natural tendency to affect, the official decision.[124] Therefore, the official decision regarding an applicant for citizenship is whether the applicant meets the requirements for citizenship.[125] Consequently, the test more specifically is whether the misrepresentation or concealment had a *natural tendency* to produce the conclusion that the applicant was qualified.[126] Regarding denaturalization of citizenship, this evidence of misrepresentation must be clear, unequivocal, and convincing.[127]

As applied, the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service.[128] The Court concluded that Kungys' misrepresentation of the date and place of his birth in his naturalization petition was not material within the meaning of the INA since those facts were not themselves relevant to his qualifications for citizenship.[129] Nevertheless, if Kungys' true date and place of birth would *predictably* have disclosed other facts relevant to his qualifications, the misrepresentation of them would have a *natural tendency* to influence the

[122] *Id.* at 774.
[123] *Id.* at 770.
[124] Kungys v. United States, 485 U.S. 759, 771 (1988).
[125] *Id.*
[126] *Id.* at 771–72.
[127] *Id.* at 772 (citing Schneiderman v. United States, 320 U.S. 118, 158 (1943)).
[128] *Id.*
[129] *Id.* at 774.

citizenship determination, and thus be a misrepresentation of material facts.[130] There was no finding, however, that the true place and date of birth would have naturally led to the disclosure of other facts.[131]

The Court left it to the Third Circuit to determine if Kungys' other misrepresentations: that of his location during the Kedainiai massacre and wartime occupation, were material to the naturalization decision—bearing in mind the unusually high burden of proof in denaturalization cases.[132]

b. *Fedorenko v. United States*: A Ukrainian's Misrepresentation of his Wartime Service as a Guard in Treblinka Was a Material Misrepresentation

i. Factual and Procedural History of *Fedorenko*

Feodor Fedorenko was born in the Ukraine in 1907.[133] He was drafted into the Russian Army in June 1941, but was captured by the Germans shortly thereafter.[134] As a German prisoner, Fedorenko received training as a concentration camp guard.[135] In September 1942, Fedorenko was assigned to the Nazi concentration camp at Treblinka in Poland, where he was issued a uniform and rifle.[136] He served as a guard at Treblinka during 1942 and 1943.[137]

In October 1949, Fedorenko applied for admission to the United States as a displaced person.[138] He falsified his visa application by lying about his wartime activities.[139] He told the investigators from the Displaced Persons Commission that during the war he had been a farmer in Poland until

[130] Kungys v. United States, 485 U.S. 759, 776 (1988).
[131] *Id.*
[132] *Id.*
[133] Fedorenko v. United States, 449 U.S. 490, 494 (1981).
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 496.
[139] Fedorenko v. United States, 449 U.S. 490, 496 (1981).

1942, and subsequently was deported to Germany where he worked in a factory.[140] Foderenko never disclosed his wartime service as an armed guard in a concentration camp.[141] He was admitted for permanent residence in the United States and lived in Connecticut, where for three decades he led an uneventful and law-abiding life as a factory worker.[142] In 1970, Fedorenko became an American citizen.[143]

In 1977, the government brought an action to revoke Fedorenko's citizenship.[144] The government charged that Fedorenko procured his naturalization illegally by willfully misrepresenting material facts by concealing that he had served as an armed guard at Treblinka and had committed atrocities against the inmates because they were Jewish.[145] At trial, the government produced six survivors of Treblinka who identified Fedorenko and testified that they had seen Fedorenko commit specific acts of violence against the camp's inmates.[146]

The government also produced Kempton Jenkins as an expert witness.[147] Jenkins was a career foreign service officer who served in Germany after the war as one of the vice councils who

[140] *Id.*
[141] *Id.*
[142] *Id.* at 497; *see* Ruth Marcus, *Death Camp Guard Fights to Keep Citizenship*, N.Y. TIMES (November 9, 1980), https://timesmachine.nytimes.com/timesmachine/1980/11/09/111815207.html?pdf_redirect=true&auth=login-smartlock&pageNumber=144 ("A native of the Ukraine, he (Fedorenko) has lived quietly since immigrating to the United States more than 30 years ago. His only offense in that time: a single parking ticket.").
[143] Fedorenko v. United States, 449 U.S. 490, 497 (1981).
[144] *Id.*
[145] *Id.* at 497-498.
[146] *Id.* at 498; *see* United States v. Fedorenko, 455 F. Supp. 893, 902–03 (S.D. Fla. 1978), rev'd, 597 F.2d 946 (5th Cir. 1979), aff'd, 449 U.S. 490, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981) (Recounting the testimony of the Treblinka's survivors: Eugeun Turowski testified that he saw Fedorenko shoot and whip Jewish prisoners at the camp. Schalom Kohn testified that he saw Fedorenko almost every day for the first few months Kohn was at Treblinka. Kohn testified that Fedorenko beat him with an iron-tipped whip, and that he saw Fedorenko whip and shoot other prisoners. Josef Czarny testified that he saw Fedorenko beat arriving prisoners, and that he once saw him shoot a prisoner. Gustaw Boraks testified that he saw Fedorenko repeatedly chase prisoners to the gas chambers, beating them as they went. Boraks also testified that on one occasion he heard a shot and ran outside to see Fedorenko with a gun drawn, standing close to a wounded woman who later told him that Fedorenko was responsible for the shooting. Sonia Lewkowicz testified that she saw Fedorenko shoot a Jewish prisoner. Finally, Pinchas Epstein testified that petitioner shot and killed a friend of his after making him crawl naked on all fours.).
[147] Fedorenko v. United States, 449 U.S. 490, 498 (1981).

administered the Displaced Persons Act (DPA), was trained to administer the DPA, and had reviewed some 5,000 visa applications during his tour of duty.[148] The vice consuls, sent to Europe to administer the DPA, made the final decisions determining eligibility.[149] Jenkins indicated that had there been any suggestion an applicant had served or had been involved in a concentration camp, processing his application would have been suspended pending an investigation.[150] If it were then determined that the applicant had been an armed guard at the camp, he would have been found ineligible for a visa as a matter of law.[151]

At trial, Fedorenko admitted he served as an armed guard at Treblinka and was aware of the murder of thousands of Jewish inmates.[152] However, in contrast to the testimony of six Treblinka survivors, he claimed that he had only served as a perimeter guard and had not injured any inmates.[153] He conceded that he deliberately gave false statements about his wartime activities on his visa application, but they were not *material* misrepresentations.[154] The District Court discredited the Treblinka survivor's identification of Fedorenko and their testimony, noted that Fedorenko was forced to serve as a guard, and held that Fedorenko should not lose his United States citizenship.[155]

The Court of Appeals for the Fifth Circuit held that the District Court erred in discrediting the Treblinka survivors' testimony.[156] Accordingly, it reversed and remanded the case with instructions to enter judgment for the government and cancel Fedorenko's certificate of

[148] *Id.* at 498-499.
[149] *Id.* at 499.
[150] *Id.*
[151] *Id.*
[152] Fedorenko v. United States, 449 U.S. 490, 500 (1981).
[153] *Id.*
[154] *Id.*
[155] *Id.* at 500-501.
[156] *Id.* at 503.

citizenship.[157] The Supreme Court affirmed the Court of Appeals decision to denaturalize Fedorenko.[158]

ii. Misrepresentation of Facts Means Misrepresentation of Material Facts

Writing for the majority, Justice Thurgood Marshall ruled that Fedorenko should be denaturalized.[159] In 1948, Congress enacted the DPA to enable European refugees driven from their homelands by the war to emigrate to the United States without regard to traditional immigration quotas.[160] The DPA's definition of "displaced persons" eligible for immigration to the United States country specifically excluded individuals who had "assisted the enemy in persecuting civilians or had voluntarily assisted the enemy forces ... in their operations...."[161] The DPA admonished, "any person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States."[162]

The Court explained, that although the DPA states "misrepresentation" it is understood that the DPA a *material* misrepresentation.[163]

The Court derived the principle that the statue spoke of material misrepresentation from the Immigration and Nationality Act of 1952, which requires revocation of United States citizenship that was "illegally procured or ... procured by concealment of a *material fact* or by *willful misrepresentation*."[164] Although the denaturalization statute speaks in terms of "*willful*

[157] Fedorenko v. United States, 449 U.S. 490, 503 (1981).
[158] *Id.* at 518.
[159] *Id.*
[160] *Id.* at 495.
[161] *Id.* at 495.
[162] *Id.* at 507.
[163] Fedorenko v. United States, 449 U.S. 490, 507 (1981).
[164] *Id.* at 493 (citing 8 U.S.C. § 1451(a)).

misrepresentation" or "concealment of a *material* fact," the Court had indicated in previous cases that the concealment, no less than the misrepresentation, must be willful and that the misrepresentation must also relate to a material fact.[165] Logically, the Court reasoned, the same principle should govern the interpretation of this provision of the DPA.[166]

iii. The Effect of a False Statement Determines Materiality

In determining the proper standard to be applied in determining whether Fedorenko's statements were material, the Court explained that the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country.[167] "At the very least," wrote Justice Marshall, "a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa."[168] Because disclosure of the true facts about Fedorenko's service as an armed guard at Treblinka would, as a matter of law, have made him ineligible for a visa under the DPA, the Court ruled Fedorenko's false statements were material.[169]

The court concluded that Fedorenko's false statements about his wartime activities were "willful and material misrepresentations made for the purpose of gaining admission into the United

[165] *Id.* at 508 n.28 (citing Costello v. United States, 365 U.S. 265, 271–272 n.3 (1961)).
[166] *Id.* One could argue for extension of the same reasoning to the FCA. Even though the FCA statute refers to fraud, the Court understood that the FCA requires *material* fraud.
[167] *Id.*
[168] Fedorenko v. United States, 449 U.S. 490, 509 (1981).
[169] *Id.* (The court notes that previous Supreme Court decisions have recognized that the right to acquire American citizenship is "a precious one," and that once citizenship has been acquired, its loss can have severe and unsettling consequences. Despite the fact that the government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship," the court held that the government carried their burden in divesting Fedorenko of citizenship.).

States as an eligible displaced person."[170] Under the express terms of the statute, petitioner was "thereafter not ... admissible into the United States."[171]

c. A Summary of Material Misrepresentation in Immigration

In *Kungys*, the petitioner's true date and place of birth would not have *predictably* disclosed other facts relevant to his qualifications. Therefore, his misrepresentation did not have a natural tendency to influence the citizenship determination, and were thus not a misrepresentation of material facts. In *Fedorenko,* however, the petitioner misrepresented *material* facts by not disclosing his position as a death camp guard. [172]

8. *Neder v. United States*: Material Misrepresentation in Tax, Wire, Mail, and Bank Fraud

In the mid-1980's Ellis Neder engaged in several real estate transactions financed by fraudulently obtained bank loans.[173] Neder obtained more than $7 million profit from the transactions and failed to report nearly all of it on his personal income tax returns.[174]

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[170] *Id.* at 513-514

[171] *Id.* Note, however, Justice Stevens' stark dissent, "I cannot accept the view that any citizen's past *involuntary conduct* can provide the basis for stripping him of his American citizenship." *Fedorenko*, 449 U.S. at 530 (Stevens, J., dissenting) (emphasis added).

[172] For Fedorenko's aftermath *see* William J. Eaton, *Soviets Execute Ex-Nazi Guard Deported by U.S.*, L.A. TIMES (July 28, 1987), https://www.latimes.com/archives/la-xpm-1987-07-28-mn-6185-story.html. (Reporting that following his trial, Fedorenko was stripped of his citizenship and deported to the Soviet Union, where he faced charges that he committed Nazi war crimes. In June 1986, a court in the Crimea in the Soviet Union sentenced the 79-year-old to death on charges of treason and taking part in mass executions at the Treblinka death camp in Poland. In 1987, Tass, the official Soviet news agency, reported that Fedorenko was executed. Fedorenko was the first person to be deported from the United States to the Soviet Union to face charges that he committed Nazi war crimes. The Tass account did not say when he was executed or provide any other details. However, the Soviet Union normally carries out death sentences by firing squad.).

[173] Neder v. United States, 527 U.S. 1, 4 (1999). (In one transaction, Neder used shell corporations to purchase several parcels of land and immediately resold them to limited partnerships that he controlled. Using inflated appraisals, he secured bank loans to purchase the properties. Neder signed affidavits falsely stating that he had no relationship to the shell corporations and that he was not sharing in the profits from the inflated land sales. He eventually defaulted on the loans. In a land development scheme, Neder qualified for a $4,150,000 loan by falsely representing to a lender that he had pre-sold 20 condominium units, whereas in fact he made the down payments himself. Subsequently, Neder defaulted on the loan. In another land development project, Neder submitted requests for loans based false invoices, and obtained almost $3 million unrelated to work actually performed.).

[174] *Id.*

Neder was indicted for: (1) filing a false income tax return, in violation of 26 U.S.C. § 7206(1); (2) mail fraud, in violation of 18 U.S.C. § 1341; (3) wire fraud, in violation of § 1343; and (4) bank fraud, in violation of § 1344.[175]

a. Is "Materiality" Required in Tax Fraud?

To obtain a conviction for filing a false income tax return in violation of 26 U.S.C. § 7206(1) the government must prove that the defendant filed a tax return "which he does not believe to be true and correct as to every material matter."[176] The Court stated as a general rule that a false statement is *material* if it has a natural tendency to influence the decision of the decisionmaking body to which it was addressed.[177] In a prosecution under § 7206(1), however, several courts have determined that "any failure to report income is material."[178] The Court concluded that under either of these formulations, no jury could reasonably find that Neder's failure to report substantial amounts of income (over $5,000,000) on his tax returns was not "a material matter."[179]

b. Is "Materiality" Required in Federal Mail Fraud, Wire Fraud, and Bank Fraud?

The federal "mail fraud statute" states, "Whoever, having devised … any scheme … to defraud … for the purpose of executing such scheme … places in any post office or … knowingly causes to be delivered by mail… shall be fined under this title or imprisoned not more than 20 years, or both."[180]

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[175] *Id.* at 6.
[176] *Id.* at 16 (citing 26 U.S.C. § 7206(1)).
[177] *Id.* (citing Kungys v. United States, 485 U.S. 759, 770 (1988)).
[178] *Id.; see also* United States v. Tarwater, 308 F.3d 494, 505 (6th Cir.2002) (holding a matter is material "if it has a natural tendency to influence, or is capable of influencing or affecting, the ability of the IRS to audit or verify the accuracy of a tax return").
[179] Neder v. United States, 527 U.S. 1, 16 (1999) (indicating even though the trial court did not instruct the jury to find if Neder's failure to report over $5 million in income was material, such an error was harmless, since such a substantial sum was certainly material).
[180] 18 U.S.C. § 1341

The federal "wire fraud statute" states, "Whoever, having devised … any scheme … to defraud, … transmits or causes to be transmitted by means of wire, radio, or television communication … shall be fined under this title or imprisoned not more than 20 years, or both."[181]

The federal "bank fraud statute" states, "Whoever knowingly executes… a scheme… (1) to defraud a financial institution; or (2) to obtain any of the moneys… owned by…a financial institution, by means of false or fraudulent pretenses … shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."[182]

At issue before the Court in *Neder* was whether the fraud statutes require that a "scheme to defraud" employ *material* falsehoods?[183] After all, the word material is not found anywhere in the three above-cited statutes.[184]

The Court of Appeals concluded that the fraud statutes *do not* require that a "scheme to defraud" employ *material* falsehoods.[185] Additionally, in its brief to the Supreme Court, the government argued that the term "defraud" would only be interpreted according to its common law meaning if the fraud statutes "indicated that Congress had codified the crime of false pretenses or one of the common law torts sounding in fraud."[186] The Supreme Court, however, disagreed and held that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.[187]

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[181] 18 U.S.C. § 1343
[182] 18 U.S.C. § 1344
[183] Neder v. United States, 527 U.S. 1, 20 (1999).
[184] *Id.*
[185] *Id.*
[186] *Id.*; *see* Brief for the United States at 33, Neder v. United States, 527 U.S. 1 (1999) (No. 97-1985), 1999 WL 6660, at *33 (asserting that "[m]ateriality is not an element of the federal mail fraud, bank fraud, and wire fraud statutes"). Note that the government could likely prosecute more cases if the fraud statutes were not limited to material fraud.
[187] Neder v. United States, 527 U.S. 1, 25 (1999).

The Court agreed that based solely on a "natural reading of the full text," materiality would not be an element of the fraud statutes since none of the fraud statutes defines the phrase "scheme or artifice to defraud," or even mentions materiality. However, it is a well-established rule of statutory construction that "where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[188]

Both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable "fraud" had a well-settled meaning at common law.[189] The well-settled meaning of "fraud" required a misrepresentation or concealment of *material* fact.[190] Moreover, many sources demonstrate that the common law could not have conceived of "fraud" without proof of materiality.[191] In conclusion, although the fraud statutes (mail, wire, and bank fraud) speak of "scheme to defraud" and do not mention materiality, the Court held that materiality of falsehood is an element of the federal mail, wire, and bank fraud statutes.[192]

[188] *Id.* at 21.
[189] *Id.* at 22.
[190] *Id.*
[191] *Id.* (first citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 579 (1996) ("Actionable fraud requires a material misrepresentation or omission."); then citing Smith v. Richards, 38 U.S. 26, 42 (1839) (stating that in an action to set aside a contract for fraud a "misrepresentation must be of something material"); and then citing 1 J. Story, COMMENTARIES ON EQUITY JURISPRUDENCE § 195 (10th ed. 1870) ("In the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other party.").
[192] Neder v. United States, 527 U.S. 1, 25 (1999).

9. Fraud in Perjury: From Lord Coke and Blackstone to the Federal Code

a. The Term Material Is Not a "Hapax Legomenon"

In *Kungys*, Justice Scalia wrote, "The term "material" in § 1451(a) is not a hapax legomenon."[193] The use of "materiality" in the context of false statements to public officials goes back as far as Lord Coke, who defined the crime of perjury as: "[p]erjury is a crime committed, when a lawful oath is ministred by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely, and falsly in a matter material to the issue, or cause in question, by their own act, or by the subornation of others."[194]

b. Blackstone: Perjury Must Be Material, Not Some Trifling Circumstance

Blackstone also used the term "material," writing that to constitute "the crime of wilful and corrupt perjury" the false statement "must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid," it is not punishable.[195] Justice Scalia added, that the perhaps most prominent of the federal statutes criminalizing false statements to public officials is 18 U.S.C. § 1001, which makes unlawful willful concealment of *material* facts in any matter within the jurisdiction of a department or agency of the United States.[196]

V. *ESCOBAR'S* GUIDELINES FOR DETERMINING MATERIALITY UNDER THE FCA

After a survey of different cases that describe material misrepresentation, this paper returns to *Escobar*. As noted above, *Escobar* stated that a misrepresentation about compliance with a

[193] Kungys v. United States, 485 U.S. 759, 769 (1988); *see* hapax legomenon, MIRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/hapax%20legomenon (last visited Nov. 27, 2022) (defining hapax legomenon as "a word or form occurring only once in a document or corpus").
[194] *Id.* (citing 3 E. Coke, INSTITUTES 164 (6th ed. 1680)).
[195] *Id.* (citing 4 W. Blackstone, COMMENTARIES).
[196] Kungys v. United States, 485 U.S. 759, 769-70 (1988).

statutory, regulatory, or contractual requirement must be material to the Government's payment decision to be actionable under the FCA. [197]

1. How Does One Determine if a Misrepresentation Is Material Under the FCA?

Escobar provided the following guidance for determining materiality in the context of the FCA. First, a misrepresentation cannot be deemed material merely because the government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment.[198] Second, nor is it sufficient for a finding of materiality that the government would have the option to decline to pay if it knew of the defendant's noncompliance.[199] Third, materiality, cannot be found where noncompliance is minor or insubstantial. [200]

Escobar concluded:

> "In sum: (1) the government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive of materiality. (2) Proof of materiality can include, but is not limited to, evidence that the defendant knows that the government consistently refuses to pay claims based on the noncompliance a particular statutory, regulatory, or contractual requirement. (3) Conversely, if the government regularly pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.[201]

2. A "Holistic Approach" to Materiality

Upon *Escobar's* remand to the circuit court, the First Circuit asserted that the language the Supreme Court used in *Escobar* made clear that courts are to conduct a "holistic approach" to determine materiality in connection with a payment decision, with no one factor being necessarily

[197] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 192 (2016).
[198] *Id*. at 194.
[199] *Id.*
[200] *Id.*
[201] *Id.* at 194–95.

dispositive.[202] The circuit court highlighted the Supreme Court's language in *Escobar*, "materiality cannot rest on a single fact or occurrence."[203]

The holistic test looks primarily to (but is not limited by) the following three factors: (1) whether the government has expressly identified a provision as a condition of payment, (2) whether the noncompliance goes to the "very essence of the bargain" or is only "minor or insubstantial, and (3) whether the government consistently refuses to pay similar claims based on noncompliance with the provision at issue, or whether the government continues to pay claims despite knowledge of the noncompliance.[204]

VI. Argument: The Difficulty in Utilizing The Government's Continuance of Payment Despite Knowledge of Fraud as a Guide in Determining Materiality

1. A Short Summary of the FCA's Materiality Requirement

The FCA prohibits the submission of false or fraudulent claims for payment to the federal government.[205] *Escobar* emphasized that the word "fraud" should be interpreted according to the common law.[206] Under the common law, fraud requires materiality.[207] In fact, the common law could not have conceived of fraud without proof of materiality.[208] In *Kungys* the court asserted that the federal courts have long displayed a quite uniform understanding of the 'materiality' concept as embodied in statutes dealing with willful misrepresentation to government officials."[209] As

[202] United States *ex rel*. Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 109 (1st Cir. 2016); *see also* United States *ex rel*. Janssen v. Lawrence Mem'l Hosp., 949 F.3d 533, 541 (10th Cir.), cert. denied, 208 L. Ed. 2d 98, 141 S. Ct. 376 (2020) (stating "[t]his inquiry is holistic").
[203] United States *ex rel*. Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 109 (1st Cir. 2016).
[204] *Id.* at 110.
[205] 31 U.S.C. § 3729.
[206] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 187 (2016).
[207] *Id.* at 192.
[208] *Id.* at 193
[209] Kungys v. United States, 485 U.S. 759, 770 (1988).

Justice Marshall wrote in *Fedorenko*, "[a]t the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa."[210]

Regarding fraud in the context of torts, a matter is material if, "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."[211] In supporting the right to rescission of contracts, Judge Cardozo wrote that a misrepresentation becomes material fraud if it goes "to the essence of the bargain."[212] In the context of immigration fraud, *Kungys* ruled that a statement is considered material if it has a natural tendency to influence the decision of the decisionmaking body to which it was addressed.[213] Using the same formulation as *Kungys*, *Neder* held that a plaintiff's failure to report substantial amounts of income (over $5,000,000) on his tax returns was "a material matter."[214] To be considered perjury, Blackstone wrote that the false statement "must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid it is not punishable."[215]

Applying these working definitions to the context of the FCA, *Escobar* proposed a three-part "holistic approach" in determining materiality: (1) whether Congress conditioned payment on the particular regulation, (2) whether the fraudulent claim went to the essence of the bargain, (3) whether the government continues to, or refuses to, pay similar claims.[216]

[210] Fedorenko v. United States, 449 U.S. 490, 509 (1981).
[211] Restatement of Torts, *supra* note 72.
[212] Junius Const. Corp. v. Cohen 178 N.E. 672, 674 (1931).
[213] Kungys, 485 U.S. at 770 (1988).
[214] Neder v. United States, 527 U.S. 1, 16 (1999).
[215] Kungys v. United States, 485 U.S. 759, 769 (1988).
[216] United States *ex rel*. Escobar v. Universal Health Servs., Inc., 842 F.3d at 110 (1st Cir. 2016).

As noted above, *Escobar* asserted that the third factor, whether the government pays, or refuses to pay, similar claims is "very strong evidence" in determining whether a misrepresentation was material.[217]

2. Is Paying a Claim Despite Knowledge of Fraud "*Very Strong Evidence*" of Materiality?

Despite labeling the third factor as "very strong evidence" in determining materiality, continued payment or nonpayment seems the *least likely* to inform materiality. In fact, in the First Circuit's decision on remand from *Escobar*, the First Circuit significantly minimized, if not dismissed out of hand, the third factor as applied to the materiality of Universal Health's fraudulent misrepresentation.[218] Moreover, in *United States ex rel. Foreman v. AECOM* (2021) the Second Circuit stated explicitly, "[t]here may be circumstances where the government's payment of a claim or failure to terminate a contract despite knowledge of certain alleged contractual violations will not be particularly probative of lack of materiality."[219]

A better understanding of (1) how the government uses the "Pay and Chase" model to "pay" health care claims within a short amount of time and only later "chase" after fraudulent claims, and (2) the government's acknowledgment of widespread fraud throughout federal health

[217] Universal Health Servs., Inc. v. United States, *ex rel*. Escobar, 579 U.S. 176, 195 (2016).
[218] United States *ex rel*. Escobar v. Universal Health Servs., Inc., 842 F.3d at 112 (1st Cir. 2016) (asserting that Universal Health's misrepresentations were material even if it came to light during discovery that the government continued to pay claims to Universal Health despite becoming aware that they were not in compliance with the pertinent regulations).
[219] United States *ex rel*. Foreman v. AECOM, 19 F.4th 85, 115 (2d Cir. 2021), cert. denied, 142 S. Ct. 2679 (2022); *accord* United States *ex rel*. Prose v. Molina Healthcare of Illinois, Inc., 10 F.4th 765, 777 (7th Cir. 2021) ("Many things could explain the government's continued contracting with Molina. It may have expected to purge the underserved NF enrollees from the books; it may have needed time to work out a way not to prejudice Medicaid recipients who had nothing to do with this problem.").

care schemes will demonstrate why the government's continued payments of claims despite its knowledge of fraud is not "very strong evidence" of materiality.

3. The "Pay and Chase" Model Makes It Easier to Understand Why the Government Continues to Pay Claims Despite Knowledge of Fraud

The government pays and investigates fraudulent claims using the "pay and chase" model.[220] Federal regulations mandate that the Medicare agency must pay almost all claims within 30 days.[221] Accordingly, by law, Medicare must pay approximately 4.9 million claims per day within thirty days of receiving the claim.[222] Theoretically, during the thirty-day time period, the claim reviewers should review each claim in order to identify the fraudulent claims.[223] The Medicare system, however, does not have the manpower to properly identify these false claims.[224] A Medicare Administrative Contractor reviews only a small percentage of claims, likely less than three percent, before providing reimbursement to the claimant.[225] The remainder of the claims are reviewed only *after* the reimbursement has been provided to the claimant.[226] The system allows the claim to be made and paid, without a fact-check of what a physician is claiming to have done.[227]

On the backdrop of the "pay and chase" model, the fact that the government continues to "pay" a Medicare claim despite its knowledge of fraud does little to indicate the materiality of an alleged fraud. By paying, the payor fulfills its statutory duty of paying within the statutory time frame. The department charged with "chase," however, is not under the same regulatory obligation

[220] Sydney Mayer, *Those Scamming Little Rascals: Power Wheelchair Fraud and the Flaw in the Medicare System*, 17 DEPAUL J. HEALTH CARE L. 149, 151 (2015).
[221] 42 C.F.R. § 447.45(d) (2022) (Under the title "[t]imely processing of claims," federal regulations require the Medicaid agency to pay 90 percent of all clean claims within 30 days of the date of receipt, 99 percent of all clean claims within 90 days of the date of receipt, and all other claims within 12 months of the date of receipt.).
[222] Mayer, *supra* note 220, at 151.
[223] Mayer, *supra* note 220, at 151.
[224] Mayer, *supra* note 220, at 151.
[225] Mayer, *supra* note 220, at 151.
[226] Mayer, *supra* note 220, at 151.
[227] Mayer, *supra* note 220, at 151.

to complete its investigation and refuse payment within the thirty-day period. In stark contrast to *Escobar's* assertion that continued payment of a fraudulent demonstrates immateriality, "[w]hat may be more likely, is that the 'pay and chase' fraud detection system is so overwhelmed, slow moving, and operates with insufficient oversight, that even when the government knows a provider commits fraud, the government will continue to pay the provider."[228]

3. The Government Acknowledges That It Only Recovers a Portion of the Total Health Care Fraud, and Contrary to *Escobar's* Assertion, the Government Recognizes That It Does Not Efficiently and Effectively, Label and Stop Health Care Fraud

In the year 2020, the total national health expenditure (NHE) grew to $4.1 trillion.[229] Of that, federal Medicare and Medicaid spending grew to a combined $1.5 trillion.[230] In 2020, the DOJ recovered nearly $2 billion in settlements and judgments relating to matters that involved the health care industry.[231] While the number $2 billion seems "eye catching," the Centers for Medicare & Medicaid Services (CMS) reported that in 2020 alone, the government has paid more than $133 billion in improper payments, which are payments that did not meet statutory, regulatory, administrative, or other legally applicable requirements and includes fraud.[232] CMS

[228] Mayer, *supra* note 220, at 151.
[229] NHE FACT SHEET, HISTORICAL NHE 2020, CTRS. FOR MEDICARE & MEDICAID SERVS. (last modified, Aug. 12, 2022) https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet [hereinafter NHE Fact Sheet 2020) (noting that $4.1 trillion equals $12,530 per person and accounted for 19.7% of Gross Domestic Product).
[230] *Id.* (remarking that Medicare and Medicaid spending account for 36 percent of total NHE).
[231] Press Release, U.S. Dep't of Just., Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021) [hereinafter DOJ Jan. 14 Press Release] https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020; Jacob T. Elberg, *A Path to Data-Driven Health Care Enforcement*, 2020 UTAH L. REV. 1169, 1883 (2020) (noting that DOJ publishes "eye-catching numbers year after year" in reaction to DOJ's announcement that the fiscal year 2019 represented the tenth consecutive year that DOJ's civil health care fraud settlements and judgments exceeded $2 billion). The DOJ has also settled individual cases of FCA violations in the *billions* of dollars. *See e.g.,* GlaxoSmithKline $3 billion settlement *supra* note 19.
[232]FACT SHEET, CTRS. FOR MEDICARE & MEDICAID SERVS., 2020 ESTIMATED IMPROPER PAYMENT RATES FOR CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) PROGRAMS (Nov. 16, 2020) [hereinafter CMS.gov Nov. 16, 2020 Fact Sheet] https://www.cms.gov/newsroom/fact-sheets/2020-estimated-improper-payment-rates-centers-medicare-medicaid-services-cms-programs (According to CMS, government data indicates that the improper payment rate hovers above 6 percent for most Medicare programs, and well over 20 percent for Medicaid and Children's Health Insurance Program (CHIP)).

reported, "[w]hile we have we have made some progress on reducing the improper payment rates in Medicare, we are not satisfied and more work needs to be done to achieve increased and consistent reductions in the future by expanding existing initiatives as well as innovative new processes."[233] The Federal Bureau of Investigation (FBI) has estimated health care fraud at between 3 to 10 percent of healthcare expenditures.[234] Since the government spends $1.5 trillion in health-care expenditures, according to the FBI percentages, the total national healthcare fraud should stand at $45 to $150 billion *per year*.

Escobar seemingly based its argument on the premise that, in theory, if a particular fraud was indeed material, the government would quickly stop payment, investigate, and charge the tortfeasor with an FCA violation. The fact that the government did not stop payment, argued *Escobar*, is "very strong evidence" that the particular fraud at issue in a given case was not material.[235] In reality, however, the government admits that its current model does not efficiently discover, investigate, and recover fraud. [236]

[233] *Id.*

[234] FED. BUREAU OF INVESTIGATION, FINANCIAL CRIMES REPORT TO THE PUBLIC 2008, https://www.fbi.gov/stats-services/publications/fcs_report2008 (2008) [hereinafter FBI 2008 Report] ("All health care programs are subject to fraud, however, Medicare and Medicaid programs are the most visible. Estimates of fraudulent billings to health care programs, both public and private, are estimated between 3 and 10 percent of total health care expenditures."); *see* National Health Care Anti-Fraud Association, The Challenge of Health Care Fraud, https://www.nhcaa.org/tools-insights/about-health-care-fraud/the-challenge-of-health-care (last visited Dec. 1, 2022) (writing that a conservative estimate of health care fraud is 3 percent of total health care expenditures, while some government and law enforcement agencies place the loss as high as 10 percent of the annual health outlay).

[235] Universal Health Servs., Inc. v. United States, *ex rel.* Escobar, 579 U.S. 176, 195 (2016).

[236] Medicare Contractors' Efforts to Fight Fraud--Moving Beyond "Pay And Chase": Hearing Before the Subcomm on Oversight and Investigations of the Comm. on Energy and Commerce, 112th Cong. 2 (2012), https://www.govinfo.gov/content/pkg/CHRG-112hhrg80217/html/CHRG-112hhrg80217.htm (last visited Dec. 1, 2022) (Statement of John D. Dingell, Chairman Emeritus, Committee on Energy and Commerce, Member, Subcomm. on Oversight and Investigation) ("[w]e all agree that CMS must move away from the pay-and-chase models to more proactively of mechanisms to catch wrongdoers."); *see also id.* (Statement of Mr. Robert A. Vito, Regional Inspector General, Dep't of Health and Hum. Servs.) ("I would like to point out to you that the work of the OIG has recognized it's better to prevent fraud than actually pay and chase. And if you look at the work that we have talked about today, largely it focuses on preventing.").

The Office of Government Accountability has echoed the above assertion and has warned that the federal health-care system is at risk of losing billions of dollars annually to fraud and abuse.[237] In particular, Seto Bagdoyan, a Director for the Government Accountability Office's Forensic Audits and Investigative Service, testified before the House Ways and Means Committee that "[m]edicare, which is administered within HHS by its Centers for Medicare & Medicaid Services (CMS), has been on our high-risk list since 1990 because of the size and complexity of the program, and its susceptibility to fraud, waste, and abuse."[238]

4. Despite Knowledge of Fraud, the Government May Continue Paying Claims Because the Specific Contract Benefits the Government

One may question *Escobar's* conclusion from yet another angle. Who is to say that a contractee would stop payment upon learning of a contractor's fraudulent misrepresentation? Perhaps there is room to say that despite the fraud, the contractee benefits greatly from the contract, and consequently continues the relationship nevertheless? In that case, the continuance of a relationship would not condone, nor minimize the contractor's fraudulent misrepresentation, in this case, an FCA violation.

In fact, in *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, the Fourth Circuit explicitly wrote that government continuance of its relationship with a contractor despite its knowledge of fraud *does not indicate* a contractor's fraudulent misrepresentations were any less material.[239] The court stated, "we can forsee instances in which a government entity might choose

[237] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, TESTIMONY BEFORE THE SUBCOMM. ON OVERSIGHT, COMM. ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, MEDICARE ACTIONS NEEDED TO BETTER MANAGE FRAUD RISKS, STATEMENT OF SETO J. BADOYAN, DIRECTOR FORENSIC AUDITS AND INVESTIGATIVE SERVICE (July 17, 2018) [hereinafter Statement of Badovan] https://www.gao.gov/assets/gao-18-660t.pdf.
[238] *Id.*
[239] U.S. *ex rel*. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 917 (4th Cir. 2003).

to continue funding a contract despite earlier wrongdoings by the contractor."[240] The court further explained "[f]or example, the contract might be so advantageous to the government that the particular governmental entity would rather not contest the false statement, even if it became aware of the false statement before the subcontractor began its work."[241]

By extension, it is therefore conceivable that Congress has decided that the most important issue for the health care system is that the work gets done, and that providers should not be afraid to provide services because they will not get paid. In other words, in the health care context, it is more beneficial to allow for some fraud to occur, rather than to de-incentivize practitioners who would hesitate to perform services if they knew they would not be paid in a timely fashion for their work.

5. Since Fraud Is Difficult to Establish, the Government May Continue Paying Claims, Especially If the Amount at Issue is Miniscule in Relation to the Total Health Care Expenditures

Mr. Bagdoyan further testified that "[b]y its very nature, fraud is difficult to detect, as those involved are engaged in intentional deception." [242] He highlighted the difficulty in establishing fraud even after the government knows of fraud in a particular instance: "[f]urther, potential fraud cases must be identified, investigated, prosecuted, and adjudicated—resulting in a conviction—before fraud can be established."[243] Mr. Bagdoyan's statements suggest that even if the government has "knowledge" of a fraudulent activity, the decision to label an activity as "fraud" and stop payment is not as clear cut as *Escobar* suggests.

[240] *Id.*
[241] *Id.*
[242] Statement of Badovan, *supra* note 237.
[243] Statement of Badovan, *supra* note 237.

Additionally, as stated above, the government spends approximately $1.5 trillion on Medicare and Medicaid per year.[244] Of that amount, improper payments total over $133 billion, and according to FBI estimates, the total fraud is somewhere between $45 and $150 billion.[245] The amount of fraud recovered under the FCA, however, totals on average more than $2 billion, with the vast majority of FCA settlements involving relatively small dollar amounts.[246] The fact that an individual recovery is relatively small compared to the total amount of Medicare and Medicaid spending coupled with the fact that it is difficult to establish fraud and stop payment also contribute to government inaction, despite its knowledge of fraud in a particular instance.[247] As the Seventh Circuit stated in *United States ex rel. Prose v. Molina Healthcare of Illinois*, "[m]edicaid (along with the Children's Health Insurance Program, or CHIP) serves more than 71 million people nationally and accounts for $600 billion in federal spending. . . . An organization like that does not turn on a dime."[248]

6. *United States v. Luce:* Despite Knowledge of Defendant's Material Fraud, The Government Continued to Approve Loans While Pursuing Debarment Proceedings Against Defendant

Like the First Circuit's holding in *Escobar*, in *United States v. Luce* the court similarly downplayed the government's reaction to a defendant's fraud.[249] In *Luce*, the defendant argued that his false misrepresentations on loan documents were not material because the government continued to approve loans originated even after learning of the defendants false certifications on

[244] NHE Fact Sheet 2020, *supra* note 229.
[245] CMS.gov Nov. 16 Fact Sheet, *supra* note 232; FBI 2008 Report, *supra* note 234.
[246] Elberg, *supra* note 20, at 381 ("Of the 195 health care industry FCA resolutions between early 2018 and April 2020 reviewed for this Article, only four were at or exceeded $100 million, nine were at or exceeded $50 million, and thirty-one were at or exceeded $20 million. At the same time, 115 were at or below $5 million, of which fifty were at or below $1 million."); *see also* DOJ February 1, 2022 Press Release, *supra* note 14 (reporting fraud recoveries under the FCA of $70,000, $30,000 and $287,055).
[247] *See* United States *ex rel*. Prose v. Molina Healthcare of Illinois, Inc., 10 F.4th 765, 777 (7th Cir. 2021)
[248] *Id.*
[249] United States v. Luce, 873 F.3d 999, 1007 (7th Cir. 2017).

loan documents and the pending charges.[250] The court disagreed, reasoning that although the government approved the defendant's loan applications, the government also began debarment proceedings against the defendant, culminating in actual debarment.[251] Rather than rely on the government's actions approving the fraudulent loan documents, the court found the fraud was material because "they were lies that addressed a foundational part of the government's mortgage insurance regime, which was designed to avoid the systemic risk posed by unscrupulous loan originators."[252] As *Luce* demonstrates, despite knowledge of a defendant's fraud, the government will continue payment (or approval) of a defendant's claim, and at the same time pursue charges against the defendant.[253]

7. In Summary: The Government Continues Payments Despite Knowledge of Fraud

Due to the "pay and chase" model, the government may continue to pay a claim despite its knowledge of a provider's fraud because the fraud-detection apparatus the government currently has in place is overwhelmed, ineffective, and does not timely refuse claims from providers which it knows submit fraudulent claims. Additionally, as *Luce* indicated, the government could also approve a providers claim for reimbursement, while at the same time pursue charges against the provider for submitting fraudulent claims. Accordingly, when assessing materiality under *Escobar*, there is room for courts to lessen the impact of the government's continuing to pay claims despite its knowledge of a practitioner's fraud, especially relating to health care fraud.

[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.*

8. Justice Holmes: An Appeal to Ordinary Experience Determines Materiality

Justice Holmes addressed the difficult issue of determining materiality in the context of contract fraud. Holmes asked, if contract law does not require background facts about the parties, how one determine what facts are material? Holmes concluded that the only way in which facts can be material is that a belief in their being true is likely to have led to the making of the contract. That belief, in turn, is determined by "an appeal to ordinary experience."

> It is said that a fraudulent representation must be material to warrant recission. But how are we to decide whether it is material or not? If the above argument is correct, it must be by an appeal to ordinary experience to decide whether a belief that the fact was as represented would naturally have led to, or a contrary belief would naturally have prevented, the making of the contract.
>
> If the belief would not naturally have had such an effect, either in general or under the known circumstances of the particular case, the fraud is immaterial. If a man is induced to contract with another by a fraudulent representation of the latter that he is a great-grandson of Thomas Jefferson, I do not suppose that the contract would be voidable unless the contractee knew that, for special reasons, his lie would tend to bring the contract about.[254]

VII CONCLUSION

As Justice Holmes wrote, courts must determine materiality by "an appeal to ordinary experience."[255] Of the three-factor "holistic test" that *Escobar* set forth as guidelines in determining materiality, the factors of "express condition of payment" and whether the fraud "goes to the essence of the bargain" most appeal to ordinary experience. A fraudulent claim that violates "an express condition of payment" or is a misrepresentation that "goes to the essence of the bargain" are strong tests for materiality. However, it is difficult to consider the government's

[254] OLIVER WENDELL HOLMES, JR., *The Common Law*, 326 (1881).

[255] Id.

continued payment after learning of the fraud as "*very strong evidence*" of materiality, since the government frequently continues to pay claims despite knowledge of fraud.

No. 07-062021

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

PATRICIA BEESLY,

Appellant

v.

THUNDER MUFFLE PAPER, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF SETONIA

BRIEF IN SUPPORT OF APPELLEE THUNDER MUFFLE PAPER COMPANY

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QUESTIONS PRESENTED

1. Whether Patricia Beesly established a *prima facie* case of sex discrimination under the federal Equal Pay Act when compared to Dylan Schrute who performs additional tasks that require distinct skills, mental exertion, and greater responsibility?
2. Whether Thunder Muffle Paper, Inc. can rely on Patricia Beesly's prior salary to set starting pay without violating the Equal Pay Act when allowing the use of prior salary to set starting pay is supported by the plain reading of the statute, legislative intent, and public policy?

STATEMENT OF JURISDICTION

In January 2020, Appellant Patricia Beesly ("Beesly") brought suit against Thunder Muffle Paper Company, Inc. ("Thunder") under the Equal Pay Act ("EPA") alleging sex discrimination. (R. 1.) On January 7, 2022, the Southern District of Setonia ("district court") granted Thunder's motion for summary judgment filed under Fed. R. Civ. P. 56. (R. 1.) Under 28 U.S.C. § 1291, Courts of Appeals have jurisdiction over all final district court decisions in the United States. On January 10, 2022, Beesly timely filed a motion for appeal. (R. 8.) On January 14, 2022, the United States Court of Appeals, Thirteenth Circuit granted Beesly's appeal. (R. 9.)

STANDARD OF REVIEW

Summary judgment orders on appeal are reviewed *de novo*, applying the same standard used by the district court. Riser v. QEP Energy, 776 F.3d 1191, 1195 (10th Cir. 2015). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If a reasonable jury could return a verdict for the nonmoving party, summary judgment is inappropriate. Riser, 776 F.3d at 1195. In reviewing a grant of summary judgment, the court views all evidence and any reasonable inferences that might be drawn therefrom in the light most favorable to the non-moving party. Id.

STATEMENT OF THE CASE

Beesly filed suit below against Thunder alleging sexual discrimination in the pay discrepancy between her and a male co-worker, Dylan Schrute ("Schrute"). (R. 1.) Thunder moved for summary judgment under Fed. R. Civ. P. 56 against Beesly. (R. 1.) First, Thunder argued that Beesly failed to establish a *prima facie* case of discrimination under the EPA. (R. 1.) Second, Thunder asserted that even if Beesly established a *prima facie* case, the pay disparity in question was due to a "factor other than sex," an affirmative defense under the EPA. (R. 1.)

On January 7, 2022, the district court ruled in favor of Thunder on two grounds. First, the court found that Beesly failed to establish a *prima facie* case because Beesly and Schrute do not perform equal work. (R. 6.) The court noted that Schrute works an early shift to handle Thunder's international clients, while Beesly works the day shift handling its domestic clients. (R. 6.) Second, the court ruled that even if Beesly established a *prima facie* case, Thunder successfully asserted a valid affirmative defense. (R. 6.) The EPA provides an exception for wage discrepancies that occur as a result of "any factor other than sex." 29 § U.S.C. 206(d)(1). (R. 6). The circuit courts disagree whether prior pay alone fits this exception. (R. 7.) The district court ruled that prior pay alone should be considered a "factor other than sex" defense. Consequently, Thunder asserted a successful affirmative defense. (R. 7.) On January 10, 2022, Beesly timely filed a motion for appeal. (R. 8.) On January 14, 2022, the United States Court of Appeals, Thirteenth Circuit granted Beesly's appeal. (R. 9.)

STATEMENT OF FACTS

Thunder Muffle

Thunder is a privately-owned paper and office supply sales and distribution company. (R. 1.) Thunder maintains a branch in Setonia City. (R. 1.) In 1996, Thunder established Standard

Operating Procedure 354 ("SOP"), which it uses to determine all initial employee salaries (R. 2.) SOP requires Thunder to give new hires a two percent raise from their prior salary. (R. 2.) Thunder adopted SOP to improve its new hire retention rate and entice new talent to apply to the company. (R. 2.)

Patricia Beesly

Beesly began working as a sales representative at Thunder's branch in Setonia City in September 2015. (R. 1.) She holds a bachelor's degree in business and a related master's degree. (R. 2.) Beesly handles a portfolio of sixty-five domestic clients and works the day shift. (R. 2, 5.) Thunder occasionally calls upon Beesly to speak Spanish for the company. (R. 2.)

Dylan Schrute

Schrute began working as a sales representative at Thunder's branch in Setonia City in October 2015. (R. 3.) Schrute earned dual undergraduate degrees in marketing and German. (R. 4.) Schrute handles Setonia City's international sales because he is fluent in German, and most of Thunder's foreign clients are based in Berlin. (R. 4.) As Schrute handles international clients, he must be familiar with German sales and consumer protection laws, be able to translate all documents and sales forms sent between the Company and its clients, and work an early shift (5 AM to 1 PM) to answer their calls. (R. 4, 5.)

Thunder awarded Schrute the "Thundie Award" in 2019 because he was the top performing sales representative, despite only managing twenty client portfolios at that time. (R. 4.) In the other years of their co-employment, Beesly out earned Schrute by only 30%, even though she managed 260% more client portfolios than did Schrute. (R. 4). Beesly has never won the Thundie Award. (R. 3.)

The Job Advertisement and Common Responsibilities

Schrute and Beesly responded to the same job advertisement, which stated that the position required a bachelor's degree in business or a related field; experience in sales; and other sales related requirements. (R. 3.) Fluency and/or proficiency in a language other than English was a "preferred" qualification. (R. 4.) As part of their duties, Beesly and Schrute are responsible for selling Thunder's products to prospective clients; performing cost-benefit analyses of existing and potential clients; monitoring competition by gathering current industry information; resolving client complaints; and submitting orders to the warehouse for fulfillment. (R. 2.)

Prior Employment and Prior Pay

Prior to working for Thunder, Schrute earned $63,725 annually as a salesperson at Setonia's largest beet farm, where he worked for ten years. (R. 4.) In compliance with SOP, Thunder first paid Schrute $65,000 annually, a two-percent increase over his previous salary. (R. 4.) Currently, Thunder pays Schrute $68,000 annually. (R. 4.) Prior to working for Thunder, Beesly worked as a salesperson at a paper company for one year and earned $40,000. (R. 2.) Before that, Beesly was a painter and instructor. (R. 2.) In compliance with SOP, Thunder first paid Beesly $40,800 annually, a two-percent increase from her previous salary. (R. 2.) Currently, Thunder pays Beesly $43,800 annually. (R. 2.)

Beesly's Concerns and Eventual Suit

In December 2020, Beesly discovered that she was paid $24,000 less than Schrute and discussed the issue with her superior. (R. 4.) Eventually, her superior explained that Thunder determined their initial salaries solely based on Thunder's SOP and that Schrute's prior salary was significantly higher than her prior salary at the time of their hiring. (R. 5.) Beesly subsequently filed suit alleging sex discrimination under the EPA. (R. 5.)

SUMMARY OF ARGUMENT

This case is about an employer who has instituted a generous standard operating procedure designed to provide all new employees with a two percent raise from their prior salaries. Yet, an employee whose position does not carry the same responsibilities of her higher paid co-worker filed suit under the EPA to: (1) demand equal pay for non-equal work; and (2) destroy a common personnel management practice designed to benefit both employees and employers.

The EPA requires employers to pay male and female employees equal wages for "equal work." To make a *prima facie* case of wage discrimination under the EPA, a plaintiff must show that the plaintiff is paid less than an employee of the opposite gender, while performing equal work. Case law supports a finding that Beesly and Schrute do not perform "equal work." Although they share the same job title, their job responsibilities differ. While Beesly sells to domestic clients, Schrute sells to international clients. In addition to the common sales responsibilities, Schrute's position requires that he be able to translate *all* sales forms and documents into German and be familiar with German sales and consumer laws. Additionally, Schrute has nine years more sales experience than Beesly has.

Once a plaintiff has made a *prima facie* case of wage discrimination, the burden shifts to the employer to defend the wage differential. Section 206(d)(1) of the EPA allows an employer to defend a wage differential if it bases the difference on: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex. Here, Thunder based both employees' current salaries on their prior pay, a gender-neutral personnel-management practice. Federal circuits disagree whether prior pay alone should qualify as a "factor other than sex." The statute's plain reading, legislative history, and public policy support a broad reading of the fourth affirmative defense under § 206(d)(1). Therefore, appellee

urges the court to adopt the holding of the Fourth, Seventh, and Eighth Circuits which hold that prior pay alone qualifies as "any factor other than sex."

In light of the following, the court should affirm the grant of summary judgment.

LEGAL ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE BEESLEY FAILED TO ESTABLISH A PRIMA FACIE CASE OF SEX DISCRIMINATION UNDER THE EPA.

The District Court correctly ruled that Beesly failed to establish a *prima facie* case under the EPA. The EPA prohibits employers from paying an employee less than that paid to an employee of the opposite sex for performing "equal work." Spencer v. Va. State Univ., 919 F.3d 199, 206 (4th Cir. 2019). Two jobs must be "virtually identical" to violate the EPA. Kling v. Montgomery Cty., 774 Fed. Appx. 791, 794 (4th Cir. 2019). To establish a *prima facie* case under the EPA, the plaintiff must establish that the: (1) skill; (2) effort; and (3) responsibility required in the plaintiff's job performance are substantially equal to those of a higher-paid employee of the opposite sex. Wheatley v. Wicomico Cty., 390 F.3d 328, 332 (4th Cir. 2004). The comparison must be made factor-by-factor with the male comparator. Strag v. Board of Trustees, 55 F.3d 943, 948 (4th Cir. 1995). Because job duties vary so widely, each suit must be determined on a case-by-case basis. Brennan v. Prince William Hospital Corp., 503 F.2d 282, 286 (4th Cir. 1974). This determination turns on the actual job content, not mere job descriptions or titles. Riser v. QEP Energy, 776 F.3d 1191, 1196 (10th Cir. 2015). A plaintiff must also demonstrate that the conditions where the work was performed were basically the same. Id. Thunder does not dispute that the working conditions were basically the same and that the male employee was paid more under such circumstances.

While Beesly and Schrute have similar responsibilities, they do not perform "equal work", as Schrute's position requires distinct skills, greater effort, responsibility, and mental exertion than Beesly's position requires. Therefore, this court should affirm the district court's ruling and dismiss Beesly's suit.

A. Beesly And Schrute's Positions Require Different Skills, Effort, And Responsibility And Therefore Cannot Be Considered "Equal Work" Under the EPA.

To establish a case under the EPA, a plaintiff must show that an employer pays different wages to employees of opposite sexes for equal work on jobs, the performance of which requires equal skill, effort, and responsibility. Corning Glass Works v. Brennan, 417 U.S. 188, 190 (1974).

Positions that require distinct skills foreclose a comparison under the EPA. Soble v. Univ. of Md., 778 F.2d 164, 167 (4th Cir. 1985); Wheatley, 390 F.3d at 332-333; See EEOC v. Port Auth. of N.Y. & N.J., 768 F.3d 247, 255 (2d Cir. 2014) (defining "equal skill" as including such factors as experience, training, education, and ability); See also Kling, 774 Fed. Appx. at 793 (finding that translating documents from English to a foreign language is a distinct skill). Jobs do not automatically involve equal effort or responsibility even if they entail overlapping duties or job titles. Soble, 778 F.2d at 167. Courts consider experience as a factor when determining equal skills. Sprauge v. Thorn Ams., Inc., 129 F.3d 1355, 1364 (10th Cir. 1997). To establish a valid EPA claim, a plaintiff must show both positions require equal effort and responsibility. Strag v. Board of Trustees, 55 F.3d 943, 948 (4th Circ. 1995). Positions with more tasks and preparation require more effort and responsibility. Id. at 950. Positions that require greater mental exertion demand greater effort and responsibility. Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 770 (7th Cir. 2007); Brennan v. Victoria Bank & Tr. Co., 493 F.2d 896, 898-899 (5th Cir. 1974).

To establish a valid EPA claim, a plaintiff must show both positions require equal skill. Sobel, 778 F.2d at 165. In Soble, a female professor who held degrees in sociology and social work and taught "community dentistry" in a dental school complained the dental school paid her less than the male professors in the dental school who held degrees in dentistry and taught dentistry. Id. The court held that merely possessing the same title of professor was not enough to satisfy the EPA requirement of "equal skills." Id. at 167. The court reasoned that the professors who taught dentistry required "highly specialized" and "distinct" skills foreclosing any comparison. Id.

Similarly, courts have pointed to specific skills and abilities when differentiating jobs. Wheatley, 390 F.3d at 332. In Wheatley, a female director of a county emergency services department claimed the county violated the EPA by paying her less than the male director of public works. Id. at 330. The court held that the two positions were incomparable, since the public works department required its director to be an engineer who directed public works, a job with distinct skills and responsibilities when compared to a director of emergency services. Id. at 332-333. The court noted that although at a high level of abstraction these positions required directors to do the same thing - supervise, coordinate, and organize, the "EPA demands more than a comparison of job functions from a bird's eye view." Id. at 333. The court declared, "we decline to hold that having a *similar* title plus *similar* generalized responsibilities is equivalent to having *equal* skills and *equal* responsibilities." Id. at 334. (Emphasis in the original).

Additionally, the court considers experience a factor in determining an employee's skills. Sprauge, 129 F.3d at 1364. Sharing some tasks does not determine "equal work" if one employee with more experience performed additional and more complex functions as part of that employee's job duties. Id. In Sprauge, a female market analyst for a jewelry company complained that her employer paid her paid less than male market analysts who performed similar tasks for other

departments. Id. at 1359. Despite the overlap in certain tasks, the court ruled the jobs incomparable, noting that the male market analysts had more marketing experience and hence performed additional and more complex assignments. Id. at 1364.

Positions are not equal if one position requires more effort and responsibility. Strag, 55 F.3d at 948. In Strag, a female mathematics professor claimed her employer violated the EPA by paying her less than a male biology professor who performed similar tasks in another department. Id. at 945. In dismissing her claim, the court noted that the math professor had more responsibilities than Strag because in addition to teaching normal lecture classes, he also instructed lab classes and advanced science courses, extra tasks that required extra preparation. Id. at 950. In particular, the math professor was responsible for preparing for extra classes, supervising lab assistants, and writing and grading extra exams. Id. Moreover, lab classes were generally longer than usual lecture classes. Id.

Furthermore, the Seventh Circuit uses greater mental exertion as a factor in determining the effort and responsibility a position requires. Sims-Fingers, 493 F.3d, at 770. In Sims-Fingers, a female city park manager complained the city paid her less than some male park managers who performed similar functions. Id. at 769-770. The court held that difference in pay did not violate the EPA since the comparative parks were diverse and heterogeneous in nature. Id. at 770. The court noted that the higher-paid managers required greater effort and responsibility, since they managed parks containing an extra element such as swimming pools. Id. Managing a park with a swimming pool requires greater effort and responsibility "because of the danger of a patron's drowning and the difficulty of proper maintenance of a large pool." Id. Some higher-paid managers managed parks that generated higher income, and a manager can "get into serious trouble if revenue dries up or money is discovered missing from the till." Id. at 770.

As the court in Soble reasoned, a plaintiff fails to establish a *prima facie* case by merely pointing to shared job title and some overlapping responsibilities. Sobel, 778 F.2d at 167. Likewise, while Beesley points to the shared job title of "sales representative," and some overlapping sales responsibilities, (R. 2, 3, 4.) Beesly and Shrute do not perform "equal work."

To establish a *prima facie* EPA claim, a plaintiff must demonstrate the two positions require equal skill. Soble, 778 F.2d at 165. In Soble, the court distinguished between two professors by establishing that a professor who held a degree in dentistry and taught dentistry employed different skills than a professor who held a degree in social work and taught "community dentistry." Id. at 167. Wheatley similarly distinguished between two county directors where one held an engineering degree and managed the department of public works and the other director managed the emergency services department. Wheatley, 390 F.3d at 332-333. Like the professors of dentistry and county directors, Beesly's and Schrute's positions require different skills. True, Beesly speaks Spanish occasionally in her position. However, Schrute, who holds a degree in German, requires the distinct skill of *translating written documents* into German. (R. 5.)

Additionally, the courts consider experience a factor in determining an employee's skills. Sprauge, 129 F.3d at 1364. In Sprauge, the court observed that the male market analysts had greater experience than the female market analyst, and hence used greater skills in their position. Id. Consequently they engaged in more complex assignments. Id. Likewise, Schrute has nine years more sales experience than Beesly, who worked for only one year in sales prior to her employment at Thunder. (R. 2, 4.) By the same token, Schrute engages in more complex assignments, such as international sales. (R. 5.) Since experience and education play a role in the complexity of job function and assignments, the district court correctly found that Schrute and Beesly do not perform "equal work," as their positions require different skills.

Case law makes clear that jobs with greater mental exertion require greater effort and responsibility. Sims-Fingers pointed to the added mental exertion of maintaining a pool or supervising a park with a higher grossing income. Sims-Fingers, 493 F.3d, at 770. Similarly, translating documents into German requires greater mental exertion than occasionally speaking Spanish. (R. 2, 5.) Furthermore, although Beesly maintains 260% more clients than Schrute, she out earns him (on average) by only 30%. (R. 4.) Additionally, while Thunder awarded Schrute the "Thundie Award" for being the highest earning employee, Beesly has never won that honor. (R. 3, 4.) Moreover, since Schrute earns (on average) more money per client, managing Schrute's clients is like managing the higher grossing park in Sims-Fingers. (R. 4.) Finally, aside from the content of his job position, Schrute keeps earlier hours than Beesly, and starts his job in the office at 5 AM. (R. 4.) That means he must go to sleep early the night before and wake up very early, certainly an aspect of his position that requires extra effort and responsibility.

Similarly, Strag distinguished a male biology professor from a female mathematics professor in observing that the biology professor prepared labs and performed other job activities that demanded greater exertion, preparation, effort, time, and responsibility. Strag, 55 F.3d at 950. Likewise, Schrute's job responsibilities include keeping up to date with foreign consumer and sales laws. (R. 5.) Such requirements are comparable to preparing for labs, which requires extra time, exertion, and preparation.

As Wheatley stated, "the EPA demands more than a comparison of job functions from a bird's eye view." Wheatley, 390 F.3d at 333. Although Beesly and Schrute may work at similar positions from a "bird's eye view," a *prima facie* EPA claim requires both positions perform equal work with equal skills. While he shares some tasks with Beesly, Schrute's position requires distinct

skills and experience, and entails more tasks, preparation, effort, and mental exertion. Therefore, the district court correctly ruled that Beesly did not establish a valid *prima facie* EPA claim.

B. Statutory Drafting And Case Law Demonstrates That Two Positions Must Be Virtually Identical To Qualify For An EPA Claim.

When Congress enacted the EPA, it substituted the word "equal" for "comparable" to show that "the jobs involved should be virtually identical." Brennan v. City Stores, Inc., 479 F.2d 235, 238 (5th Cir. 1973) (citing Cong. Rec., Vol. 109, Part 7 (88th Congress, 1st Session); Beck-Wilson v. Principi, 441 F.3d 353, 356 (6th Cir. 2006); Sims-Fingers, 493 F.3d at 771-772 (ruling the proper domain of the EPA consists of standardized jobs in which a man is paid more than a woman and there are no skill differences, "an example might be two sixth-grade music teachers, having the same credentials and experience, teaching classes of roughly the same size in roughly comparable public schools in the same school district.").

In Beck-Wilson, female employees complained that a hospital violated the EPA by paying female nurse practitioners lower wages than male physician assistants. Beck-Wilson, 441 F.3d at 356. The defendant hospital used both groups of employees interchangeably, and both groups performed substantially similar tasks. Id. at 361. The court ruled that if positions are "fungible" they are equal. Id. at 364.

To violate the EPA, the two positions must be virtually identical. City Stores, 479 F.2d at 238. Fungible positions are equal. Beck-Wilson, 441 F.3d at 364. Unlike the physician assistants and nurse practitioners in Beck-Wilson who performed each other's tasks, Beesly and Schrute serve different clients (domestic and international) and perform different tasks in the course of their employment. (R. 2-5.) Since Schrute's and Beeslys' positions are not "fungible," "virtually identical," or "standardized jobs with no skill differences," the district court correctly ruled that

Schrute and Beesly do not perform equal work. As a result, this court should uphold the district court's ruling that Beesly did not prove a *prima facie* case of pay discrimination under the EPA.

II. EVEN IF BEESLY CAN ESTABLSIH A CASE OF SEX DISCRIMINATION UNDER THE EPA THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THUNDER'S USE OF PRIOR PAY CONSTITUTES A FACTOR OTHER THAN SEX AND IS A VALID AFFIRMATIVE DEFENSE UNDER 29 U.S.C. §206(d)(1).

Even if Beesly can establish a *prima facie* case of pay discrimination under the EPA, her claim should still fail because Thunder based her salary on prior pay, a valid affirmative defense under the EPA.

Under the EPA, once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to defend the wage differential. Spencer, 919 F.3d at 206. § 206(d)(1) of the EPA provides an employer with four affirmative defenses for wage differential: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor other than sex. Beck-Wilson, 441 F.3d at 360 (citing Corning Glass, 417 U.S. at 196). Since these are affirmative defenses, the defendant bears the burden of proof. Id. If the defendant fails in this respect, the plaintiff will prevail on her *prima facie* case. Id. It is undisputed in this case that the first three affirmative defenses are not applicable, as Thunder only raised the defense of "a factor other than sex."

The circuits split on what constitutes a "factor other than sex." The Fourth, Seventh, and Eighth Circuits hold that prior pay alone qualifies as a factor other than sex. Spencer, 919 F.3d at 206; Wernsing v. Dep't of Human Servs., 427 F.3d 466, 467 (7th Cir. 2005); Taylor v. White, 321 F.3d 710, 717 (8th Cir. 2003). The Second and Sixth Circuits hold that prior pay combined with a legitimate business reason qualifies as a "factor other than sex." Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d r. 1992); Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005).

The Tenth and Eleventh Circuits hold that prior pay qualifies as "a factor other than sex" only when combined with a gender-neutral factor such as experience. Riser, 776 F.3d at 1199 (10th Cir. 2015); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995). The Ninth Circuit, however, completely disqualifies prior pay as an affirmative defense. Rizo v. Yovino, 950 F.3d 1217, 1220 (9th Cir. 2020).

Appellee urges the court to adopt the holding of the Fourth, Seventh, and Eighth Circuits that prior pay alone qualifies as "a factor other than sex," because the plain reading of the statute, legislative history, and public policy support the rule that employers can base their current salaries on prior pay. Alternatively, Appellee urges the court to adopt the test of the Second and Sixth Circuits, because Thunder adopted SOP for a legitimate business reason, to improve new hire retention rate and entice new talent to apply to the company. (R. 2.) In the alternative, Appellee urges the court to adopt the test of Tenth and Eleventh Circuits. Since Schrute has more experience and responsibilities than Beesly, (R. 5.) Thunder would still prevail under the holdings of those circuits. Finally, this court should disregard the Ninth Circuit's holding in Rizo as it ignores the statute's plain language, legislative history, and public policy. Consequently, this court should find that Thunder appropriately relied on SOP to set their employees' salaries and affirm the District Court's grant of summary judgment.

A. A Plain Reading Of The Statute Indicates That Prior Pay Alone Is A Valid Factor Other Than Sex.

Based on the statute's plain reading, prior pay alone qualifies as a "factor other than sex." As such, the district court correctly held that Thunder presented a valid affirmative defense under 206(d)(1) of the EPA. A plain reading of the statute indicates that prior pay alone is a "factor other than sex" and need not be related to the requirements of the particular position in question. Wernsing, 427 F.3d at 467; Taylor, 321 F.3d at 717; Spencer, 919 F.3d at 206.

An employer may use prior pay alone to set pay under the EPA. Wernsing, 427 F.3d at 468. In Wernsing, a female employee of the Illinois Department of Human Services ("IDHS") complained that the IDHS paid her less than a male employee for equal work because the IDHS based her current salary on prior pay. Id. at 467. The Seventh Circuit affirmed the department's affirmative defense of prior pay, reasoning that a plain reading of the statue confirms that prior pay alone without any other business reason is a "factor other than sex." Id. at 467-68.

The Seventh Circuit reasoned that the EPA only forbids pay differences "on the basis of sex" rather than differences that have other origins (such as prior pay), and the EPA drives this home by exempting any pay "differential based on any other factor other than sex." Id. at 468. Accordingly, the statute's plain meaning rejects the theory that requires an employer to present a qualifying "acceptable business reason" to qualify as a "factor other than sex." Wernsing, 427 F.3d at 469. The court declared, "Section 206(d) does not authorize federal courts to set their own standards of 'acceptable' business practices—the statute asks whether the employer has a reason other than sex, not whether it has a 'good' reason." Id. at 468.

The Eighth Circuit reasoned that the EPA does not suggest any limitations to the broad catch-all "factor other than sex" affirmative defense. Taylor, 321 F.3d at 717. Accordingly, prior pay alone is a "factor other than sex," and Thunder properly based both Schrute's and Beesly's salaries solely on prior pay. (R. 5.) Accordingly, Appellee urges the court to adopt the holding of the Fourth, Seventh, and Eighth Circuits and affirm the District Court's ruling.

B. The Legislative History Indicates That Prior Pay Alone Constitutes a Factor Other Than Sex.

The EPA's legislative history indicates that Congress intended a "factor other than sex" to be a "broad general exclusion." Taylor, 321 F.3d at 717. Consequently, prior pay alone should constitute a "factor other than sex."

The legislative history supports the idea that prior pay alone is a "factor other than sex." Taylor, 321 F.3d at 718. In Taylor, a civilian Army employee complained that the Army paid her less than a male employee for equal work because the Army based her current salary on prior pay. Id. at 711. The court pointed to the legislative history, which referred to "any factor other than sex" as a "broad general exclusion." Id. at 717. The legislative history also states that an employer may defend a pay differential if the reason for the pay differential is a salary retention policy. Id. The court upheld the Army's affirmative use of prior pay in setting salaries, reasoning prior pay is a salary retention policy designed to retain skilled workers and protect workers' salaries. Id. at 716.

Legislative history also provides evidence of Congressional responsiveness to business needs by the statements of members of Congress who, during floor debates, expressed concerns about disrupting the legitimate conduct of businesses. Jeanne M. Hamburg, When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act, 89 Colum. L. Rev. 1085, 1097 (1989) (citing 109 Cong. Rec. 9198 (1963) containing the statements of several Representatives). Additionally, businesses require flexibility, and by enabling employers to defend a charge of wage discrimination under the EPA by interposing the factor other than sex defense, Congress sought to defer to business needs for flexibility in setting wages without compromising the EPA's antidiscriminatory purpose. Id.

Taylor ruled that employers may rely on prior pay since the legislative history refers to "any factor other than sex" as a "broad general exclusion." Taylor, 321 F. 3d at 717. Moreover, the legislative history specifically labels a salary retention policy as a factor other than sex, and Taylor concluded that prior pay is also a salary retention policy. Id. Similarly, Thunder adopted SOP to entice and retain employees. (R. 2.) Finally, as Columbia Law Review notes, the legislative

history undoubtedly demonstrates that Congress favored a broad business exception and was concerned about disrupting the conduct of businesses. Prior Pay, 89 Colum. L. Rev. at 1097.

The legislative history clearly demonstrates Congress's intent that the "factor other than sex" be read broadly and provide businesses the flexibility necessary to maintain salary retention policies. Accordingly, the court should adopt the holding of the Seventh, Fourth, and Eighth Circuits, endorse the legality of Thunder's SOP, and affirm the ruling of the district court.

C. Public Policy Dictates That the Court Should Hold Prior Pay Qualifies as a Factor Other Than Sex.

Public policy supports basing current salary on prior pay alone because many employers that base salaries on prior pay do so to attract new talent by giving them a raise. The policy thus gives the benefit of making the job more attractive to the best candidates. Prior Pay, 89 Colum. L. Rev. at 1102; Wernsing, 427 F.3d at 468. Additionally, basing current salary on prior pay is gender-neutral and does not, absent other factors, perpetuate wage discrimination. Wernsing, 427 F.3d at 467, 470.

Legitimate business interests may justify employers' practice of referring to potential job candidates' pay in previous positions. Prior Pay, 89 Colum. L. Rev. at 1102. Reference to previous pay enables firms to determine what competitors are paying, so that they can ascertain the salary necessary to induce a job candidate to accept an offer of employment, and to make an initial determination of the value of an employee's skills at a time when the employer has not yet had the opportunity to establish the value of those skills. Id. Without consulting prior pay, employers might be unable to attract desirable employees or assess job candidates' worth. Id.

Absent previous discrimination, basing current salary on prior pay does not perpetuate wage discrimination. Wernsing, 427 F.3d at 470. The court in Wernsing agreed that if sex discrimination led to lower wages in the "feeder" jobs, then using those wages as the basis for pay

at the current job would indeed perpetuate discrimination. Wernsing, 427 F.3d at 470. However, "plaintiffs bear the burden of persuasion in civil litigation," and if the record is silent about this possibility, courts do not have to assume that sex discrimination led to lower prior pay in a plaintiff's previous employment. Id. It is noteworthy that Beesly did not plead that her previous employer underpaid her due to her sex. (R. 1-5.)

Public policy supports holding that prior pay is a factor other than sex. Since: (1) basing salary on prior pay is a common, gender-neutral practice instituted for the benefit of the employee and the employer; and (2) absent sex discrimination in the employee's previous position, prior pay does not perpetuate wage discrimination, prior pay should qualify as a factor other than sex, an affirmative defense under the EPA.

D. Government Data Shows That The EPA Has Been Effective At Narrowing The Wage Gap Between Men and Women.

Government employment data shows that the EPA has been effective in narrowing the pay gap, especially between young men and young women. Earlene K.P. Dowell, Gender Pay Gap Widens as Women Age, U.S. Census Bureau, Jan. 27, 2022, https://www.census.gov/library/stories/2022/01/gender-pay-gap-widens-as-women-age.html. The gender pay gap has narrowed significantly since the signing of the Equal Pay Act of 1963. Id. The gender gap has especially narrowed for younger women as they increase their education levels and break into occupations traditionally dominated by men, like information, professional, scientific, or technical services. Id. Although a gender pay gap still exists, motherhood plays a large role in the pay disparity. Amanda Barroso & Anna Brown, Gender Pay Gap in U.S. Held Steady in 2020, Pew Research Ctr., May 25, 2021, https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/. Motherhood can lead to interruptions in women's career paths and have an impact on long-term earnings. Id. Once women become mothers, juggling family caregiving

responsibilities and work can be a challenge. Id. Mothers, even those who are married and work full time, tend to carry a larger load at home than fathers when it comes to these tasks. Id.

Government data shows the EPA has been successful in narrowing the gender pay gap and research shows motherhood plays a role in the current gender pay disparity. Subsequently, this court should adopt the test of the Fourth, Seventh, and Eighth Circuits who hold that prior pay alone is a valid factor affirmative defense under the EPA.

E. The Second And Sixth Circuits Hold Prior Pay Combined With A Legitimate Business Reason Is Considered A Factor Other Than Sex.

In the alternative, if the court does not adopt the Seventh Circuit's test, the court should adopt the test of the Second and Sixth Circuits, which hold that prior pay combined with a legitimate business reason is considered a "factor other than sex." Aldrich, 963 F.2d at 525; Balmer, 423 F.3d at 612; (holding "the Equal Pay Act's catch-all provision does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason"). Similarly, in addition to basing Schrute's salary on prior pay, (R. 5.) Thunder adopted SOP to improve their new hire retention rate and entice new talent to apply to the company, (R. 2.) a legitimate business reason. Consequently, if this court were to adopt the holding of the Second and Sixth Circuits, Thunder would still prevail.

F. The Tenth And Eleventh Circuits Hold Prior Pay Is Considered A Factor Other Than Sex In Conjunction With A Gender-Neutral Factor Such As Responsibility and Experience.

Alternatively, if the court does not adopt the Second and Sixth Circuit's test, the court should adopt the test of the Tenth and Eleventh Circuits, which hold that prior pay combined with a gender-neutral factor such as responsibility and experience is considered a "factor other than sex." Riser, 776 F.3d at 1199; Irby, 44 F.3d at 955 (holding an EPA defendant may successfully

raise the affirmative defense of a "factor other than sex" if he proves that he relied on prior salary *and experience* in setting an employee's salary) (emphasis added).

In Riser, a female employee who managed a fleet of over 250 vehicles complained that she was paid less than a male employee who performed equal work. Id. at 1193. The court held that prior pay alone could not account for a 31% pay disparity between the male and female employee. Id. at 1199. The court noted, however, that prior pay could be used as a factor in conjunction with "legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." Id. As stated above, legitimate, business-related differences in work, responsibilities, and experience greatly differentiate Beesly's and Schrute's positions. Schrute has years more experience than Beesly (R. 4.) and his position entails greater work responsibilities. (R. 5.) Consequently, even if the court does not adapt the test of the other circuits, Thunder will still prevail if the court adopts the test of the Tenth and Eleventh Circuits.

CONCLUSION

This court should affirm the district court's ruling that Beesly failed to establish a *prima facie* case under the EPA. Beesly and Schrute do not perform "equal work." Although their job titles are the same and they perform some overlapping tasks, Schrute's position differs from Beesly's in both skill, effort, responsibility, and mental exertion. Additionally, Thunder based Beesly's and Schrute's salaries on prior pay, and a plain reading of the statute, legislative history, and public policy support the notion that prior pay alone is a valid affirmative defense under the EPA. For the foregoing reasons, we respectfully request the court affirm the district court's grant of summary judgment.

Respectfully Submitted,

By: /s Eliyahu A. Prero

Dated: April 13, 2022

Applicant Details

First Name	**Da Hyung**
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Applicant Education

BA/BS From	**Other**
JD/LLB From	**Touro College Jacob D. Fuchsberg Law Center** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23313&yr=2009**
Date of JD/LLB	**May 22, 2022**
Class Rank	**Not yet ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Royal Military College Club of Canada** **Veterans Association of Canada**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

64-24 251st St
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July 31, 2023

Julien Xavier Neals
United States District Court
50 Walnut St #4015
Newark, NJ 07102

Dear Judge Neals,

This letter is to express my interest in becoming a judicial law clerk in your chambers beginning September 2023. I recently graduated from Touro College Jacob D. Fuchsberg Law Center, where I was part of the Trial Advocacy Practice Honor Society as Director of Outreach and a member of the international law and Cybersecurity organizations. Enclosed you will find my current resume, an official law school grade report, two recommendation letters, and a writing sample that was for a Land use and zoning class led by Provost of the Graduate and Professional Divisions of Touro College, Patricia Salkin. As I begin my legal career, a judicial clerkship position in your chambers will provide me with invaluable insight into not only the judicial decision-making process but also set the foundation to lead a righteous legal career.

My desire to pursue a judicial law clerk position in your chambers is a result of several different factors. First, through my legal studies, I have the research and writing skills that are expected from a judicial law clerk. Throughout my law school studies, I have had the pleasure of being a part of many associations, most importantly the Trial Advocacy Practice Honor Society which enhanced my research skills. Second, I have proven that I can handle a fast-paced environment. Throughout most of my legal studies, I was working full-time and studied as part of the part-time evening studies curriculum. I was also involved in public interest activities such as working with the Landlord Tenant and Mortgage foreclosure and Veterans clinics throughout law school. All these factors contributed to my decision to consider a judicial law clerk position. Finally, I am committed to serving the public throughout my legal career. In my previous job, I was a military officer and dedicated to public service and I wish to continue my dedication and commitment through my role as a judicial law clerk.

In my previous employment as a Business Consultant for a legal technology firm, I have experience researching, designing, and building legal technology solutions, specifically in the following topics: Intellectual Property, International Trade, Data Privacy, Health, and Environmental, Social, and Governance law. Additionally, I was the coordinator for BRYTER Open, the pro bono branch of the company, where I worked with local and global non-profit organizations such as the Red Cross, United for Ukraine, and law schools to create legal automation tools to provide easier access to legal support for the public. As part of this initiative, I have led law school classes on legal innovation and technology as a consultant. I understand that compared to my fellow colleagues, my academic performance falls short. However, I can promise you that there will be no one more dedicated to the job. I believe in hard work and dedication, and I hope my professional references will reflect the dedication and exemplary professional skills. Thank you for your time and consideration. Please let me know if you need any additional information from me. I hope to have the opportunity to meet with you soon.

Respectfully yours,

Da Hyung (Mari) Sun

Da Hyung (Mari) Sun

64-24 251st Street, Little Neck NY, 11362 | (646) 709-3755 | maris26345@gmail.com

EDUCATION

Touro College Jacob D. Fuchsberg Law Center, Central Islip, NY
Juris Doctorate, May 2022 (Evening Division)
Activities: Trial and Advocacy Practice Society (Director of Outreach), International Law Society, Cybersecurity Law Society

Royal Military College of Canada, Kingston, Ontario, Canada
Master's in Public Administration, July 2017

Royal Military College of Canada, Kingston, Ontario, Canada
Bachelor's in Business Administration, May 2015

College militaire royal du St jean, St jean sur Richelieu, Quebec, Canada
College diploma studies in General Arts, May 2012

LEGAL EXPERIENCE

BRYTER, New York, NY (remote office with London, UK, and Frankfurt, Germany)
Business Consulting Legal Consultant/Pre-sale engineer/BRYTER Open Coordinator US June 2021- present
Responsible for researching, designing, and building legal technology solutions using BRYTER,
Research changes in regulations to develop new Business Use Cases for law firms and corporate legal counsel,
Create and lead information and training sessions on legal topics (IP, International Law, Data Privacy, Health Law, and ESG),
Draft white papers and create outreach marketing materials,
Supervise interns on the Business Consulting team with legal and business service-related projects, and
Liaise and work with non-profit and law schools to provide legal technology solutions to non-profits, clinics, and students.

American Bar Association, New York, NY January 2023- present
American Bar Association Section of Dispute Resolution HealthCare section Fellow
Responsible for conducting research, writing articles for a section publication, organizing a section educational webinar or podcast and developing new methods of using ADR in Healthcare.

Nassau County Bar Association, Mineola, NY
Legal Intern May 2021- September 2021
Supported the Foreclosure Settlement conference at the New York Supreme Court with the NCBA,
Assisted attorneys with case research, including searching on NYSCEF to prepare for client meetings, and
Researched and wrote grant proposals to secure future grants for NCBA.

Touro Law Center Meditation Clinic, Central Islip, NY
Mediator August 2020-December 2020
Responsible for supporting and facilitating the mediation between landlord-tenant issues during the COVID-19 pandemic,
Researched COVID-19 Emergency Eviction and Foreclosure Act and Eviction Protection Acts for Tenants, and
Assisted attorneys with case research in preparation for meetings.

JAG Canadian Forces Base Kingston, Kingston, ON, Canada
Legal Assistant May 2015-June 2015
Assist JAG officers with organizing the legal ordinances and regulations.

OTHER EXPERIENCE

STAND, Ottawa, Canada
Program Coordinator May 2021- December 2021
Responsible for supporting the education, training, and events at STAND Canada to bring awareness to genocide prevention and to advocate for Canadian policy change to support the end of global genocides.

UN Women, New York, NY
Resource Mobilization, Individual Digital, and Public Giving Unit intern July 2019 – November 2019
Responsible for supporting the Resource Mobilization and Individual Giving of National Committees through reviewing, monitoring, and providing governance and policy support for the National Committees. Also, I assisted in liaising with National Committees to prepare progress and financial reports.

United Nations Development Programme, New York, NY
Bureau of Management Services, Central Procurement Unit intern November 2018-May 2019
Support the procurement of goods and services of UNDP at New York Headquarters according to the UNDP Procurement Programme and Operations Policies and Procedures.

Royal Military College of Canada, Kingston, ON, Canada
- *Liaison officer* May 2015 -May 2017
  Responsible for the management, administration, marketing, and operations of the liaison office.
- *Military officer* May 2015 -May 2017
  Responsible for routine duty officer appointments and operational support tasks.
- *Research Assistant to Dr. Nicole Berube* May 2015 – January 2016
  Assisted research on the use of socialization theory to analyze behaviors and trends of Officer Cadets.

Royal Military College of Canada, Kingston, ON, Canada
Officer Cadet July 2011 – May 2015
Responsible for the administrative, discipline, training, and evaluation of team members and followed up through period performance evaluations.

ASSOCIATIONS
Royal Military College Club of Canada, Veteran Affairs Canada
OTHER
Languages: English, Korean, and working proficiency in French
Interests: Veterans affairs, security, aviation, international relations, golf
Skills: Certified in Westlaw and LexisNexis research
Certifications: Canadian Association of Snowboard Instructors Level 1, Basic Military Officer Qualification, Canadian Armed Forces (CAF) Air Force Junior Officer Development, CAF Junior Officer Development, CAF Designated Assistant, CAF Casualty Assistant Management, CAF Information Management, CAF WHMIS, CAF Defence Ethics, CAF Military Personnel Management, ICRC Introduction to International Humanitarian Law (IHL), UN BSAFE , OCHA United Nations Humanitarian Civil-Military Coordination Principle of Last Resort, OCHA United Nations Humanitarian Civil-Military Coordination in Support of Humanitarian Access, UN OCHA OSOCC Awareness course

TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Name
Da Hyung Sun

ID Number | Social Security Number | Date of Birth
T00346745 | **05/08/1993**

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Date 13-SEP-2022
Level NY Law Professionals

Course Level: NY Law Professionals

Primary Program
Juris Doctor
Program : JD in Law (JLW)
College : Law Center
Campus : Central Islip
Major : Law

Degree Awarded Juris Doctor 07-JUN-2022
Primary Degree
Program : JD in Law (JLW)
College : Law Center
Campus : Central Islip
Major : Law

INSTITUTION CREDIT:

SUBJ NO.		COURSE TITLE	CRED	GRD	R
Fall 2018					
LAWN 610	CI	Contracts I	3.00	B+	9.99
LAWN 643	CI	Legal Process I	3.00	B-	8.00
LAWN 741	CI	Torts	5.00	B	15.00
Ehrs: 11.00 GPA-Hrs: 11.00 QPts: 33.00 GPA: 3.00					
Spring 2019					
LAWN 611	CI	Contracts II	3.00	C	6.00
LAWN 630	CI	Property	5.00	C-	8.33
LAWN 644	CI	Legal Process II	3.00	C	6.00
Ehrs: 11.00 GPA-Hrs: 11.00 QPts: 20.33 GPA: 1.84					
Summer 2019					
LAWN 713	CI	Sports Law (iLaw)	3.00	C-	5.00
Ehrs: 3.00 GPA-Hrs: 3.00 QPts: 5.00 GPA: 1.66					

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO.		COURSE TITLE	CRED	GRD	R
Fall 2019					
LEAVE OF ABSENCE					
Spring 2020					
For the Spring 2020 semester, due to the COVID-19 pandemic, all students were subject to a mandatory Pass/Fail grading system.					
LAWN 545	CI	Healthcare Compliance (iLaw)	3.00	P	0.00
LAWN 674	CI	Real Estate Transactions	2.00	P	0.00
LAWN 680	CI	Trusts & Estate	3.00	P	0.00
LAWN 770	CI	Business Organizations I	3.00	P	0.00
Ehrs: 11.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00					
Summer 2020					
LAWN 650	CI	Professional Responsibility	2.00	C+	4.66
Ehrs: 2.00 GPA-Hrs: 2.00 QPts: 4.66 GPA: 2.33					
Fall 2020					
ADVANCED WRITING REQUIREMENT					
LAWN 636	CI	Constitutional Law I	3.00	F	3.00
LAWN 670	CI	Land Use/Zoning/Planning (OL)	3.00	B+	9.99
LAWN 671	CI	Civ Dispute Res & Procedure I	3.00	C	6.00
LAWN 917	CI	Mediation Clinic	3.00	A	12.00
Ehrs: 9.00 GPA-Hrs: 12.00 QPts: 30.99 GPA: 2.58					
Spring 2021					
LAWN 583	CI	Negotiations	3.00	B+	9.99
LAWN 637	CI	Constitutional Law II	3.00	C	6.00
LAWN 672	CI	Civ Dispute Res & Procedure II	3.00	B-	8.00
LAWN 676	CI	Remedies (FP)	3.00	B-	8.00
Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 32.00 GPA: 2.66					

********** CONTINUED ON PAGE 2 **********

Issued To: Da Hyung Sun
6424 251st St
Little Neck, 11362-2302

Lidia Meinsl
Jacob D. Fuchsberg Law Center
University Registrar

JACOB D. FUCHSBERG LAW CENTER OFFICIAL SEAL TOURO COLLEGE

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TOURO LAW
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Name
Da Hyung Sun

Page 2
Date 13-SEP-2022
Level NY Law Professionals

ID Number Social Security Number Date of Birth
T00346745 **05/08/1993**

SUBJ NO. COURSE TITLE CRED GRD R
Institution Information continued:

Summer 2021

LAWN 513	CI	Externship Seminar	2.00	A	8.00
LAWN 563	CI	Externship Placement	2.00	CR	0.00
LAWN 636	CI	Constitutional Law I	3.00	C	6.00
LAWN 724	CI	Internatnl Law	3.00	B+	9.99

Ehrs: 10.00 GPA-Hrs: 8.00 QPts: 23.99 GPA: 2.99

Fall 2021

LAWN 516	CI	Intellectual Property (OL)	2.00	B	6.00
LAWN 617	CI	Criminal Law I	3.00	C+	6.99
LAWN 640	CI	Evidence	4.00	C-	6.66
LAWN 952	CI	Advanced Legal Analysis I	2.00	C	4.00

Ehrs: 11.00 GPA-Hrs: 11.00 QPts: 23.66 GPA: 2.15

Winter Intersession 2021-2022

LAWN 871	CI	S/T in Racism & Law/Scottsboro	1.00	A	4.00
LAWN 947	CI	ST: Law and Literature	1.00	A-	3.66

Ehrs: 2.00 GPA-Hrs: 2.00 QPts: 7.66 GPA: 3.83

Spring 2022

LAWN 733	CI	Amr Lgl Studies	3.00	B	9.00
LAWN 734	CI	Amer Legal Studies Practicum	1.00	B+	3.33
LAWN 953	CI	Adv Lgl Anal II	2.00	A-	7.33

Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 19.66 GPA: 3.27

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	88.00	78.00	201.00	2.57
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	88.00	78.00	201.00	2.57

********** END OF TRANSCRIPT **********

Lidia Meinsl
Jacob D. Fuchsberg Law Center
University Registrar

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Grading System:

Grading System for all enrolled students effective Fall 2011:
Grades and Quality Points are assigned on the following scale:

A+	=	4.333	B-	=	2.667
A	=	4.000	C+	=	2.333
A-	=	3.667	C	=	2.000
B+	=	3.333	C-	=	1.667
B	=	3.000	F	=	1.000

Grading System for entering students effective Fall 2007, and for returning students, effective Summer 2008:
Grades and Quality Points are assigned on the following scale:

A+	=	4.333	C+	=	2.333
A	=	4.000	C	=	2.000
A-	=	3.667	C-	=	1.667
B+	=	3.333	D+	=	1.333
B	=	3.000	D	=	1.000
B-	=	2.667	F	=	0.000

Grading System for students who began their studies in 1988 – 2006:
Grades and Quality Points are assigned on the following scale:

A	=	4.000	C	=	2.000
A-	=	3.667	C-	=	1.667
B+	=	3.333	D+	=	1.333
B	=	3.000	D	=	1.000
B-	=	2.667	F	=	0.000
C+	=	2.333			

Grading System for students who began their studies in 1982 – 1987:
Grades and Quality Points are assigned on the following scale:

A	=	4.000	C	=	2.000
A-	=	3.667	C-	=	1.667
B+	=	3.333	D+	=	1.333
B	=	3.000	D	=	1.000
B-	=	2.667	D-	=	.667
C+	=	2.333	F	=	0.000

Grading System for students who began their studies in 1980 – 1981:
Grades and Quality Points are assigned on the following scale:

92-100	A+. A	=	4.000	68-71	C	=	2.000
85-92	A-	=	3.667	65-67	C-	=	1.667
82-84	B+	=	3.333	62-64	D+	=	1.333
78-81	B	=	3.000	58-61	D	=	1.000
75-77	B-	=	2.667	55-57	D-	=	.667
72-74	C+	=	2.333	54 & below	F	=	0.000

Non-numeric grades are assigned as follows:

P	=	Passed	TR	=	Transfer Credit
P*	=	Passed with Honors	W	=	Withdrew with permission
CR	=	Credit	W*	=	Second Chance Option
INC	=	Incomplete	WNA	=	Withdrew never attended
N	=	No Grade Submitted	WF/WU/G	=	Administrative Failure
NC	=	No Credit			

For students in the entering classes from Fall 1997 through Fall 2004, the value of each letter grade was calculated using "quality points" expressed to only two (2) decimal places.

As of April 2016, the Touro College and University System and its subsidiaries implemented a new student information system. In so doing, the formatting of student transcripts changed. This will certify that the transcript format produced on or after May 2, 2016, official or unofficial is the result of the change to the new system.

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Da Hyung (Mari) Sun

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To: Judge Julien Xavier Neals
From: Da Hyung (Mari) Sun
Re: Writing Sample, *Role of Land use in the Regulation of Waste in New York*
Date: Jul 31, 2022

The attached writing sample is the final draft analyzing land use regulations in New York which I wrote as part of my Advanced Writing Requirement in Land Use and Zoning class during the Fall semester of my second year of law school. During the drafting process, I revised the memo based on comments and suggestions from my professor. However, the writing is entirely my own.

Land Use, Zoning & Planning seminar is part of the Touro Land Use & Sustainable Development Law Institute which is a three-credit course that emphasizes the practical application of zoning regulations. The course presents a survey of the various governmental land use control mechanisms, including zoning, building codes, and environmental laws and procedures.

The first part of my paper discussed the regulations of waste management in the state of New York and laws addressing the zoning regulations of waste management facilities. The second part discussed the police power of zoning ordinances and regulations and their impact on waste management facilities. Lastly, the paper analyzes the environmental justice issues related to waste management facilities and how they work with Federal, State, and Municipal land use laws to locate, operate, and monitor waste management facilities.

I have included the discussion of the police power of zoning ordinances and regulations and some analysis of the application of the regulations.

I. Introduction - Omitted

II. Regulation of Waste through zoning

1. Constitutional Powers and Zoning

The SZEA established by the United States Department of Commerce in 1926 states that local governments are empowered to "regulate and restrict, number of stories, and size of buildings, and other structures...and the location and use of a building, structures, and land for trade, industry, residence or other purposes."[1] At a Federal level, the Environmental Protection Agency (EPA) and the Resource Conservation and Recovery Act of 1976 (RCRA)[2] regulate the household, industrial, and manufacturing of solid and hazardous wastes.[3] The EPA is an agency operated by the United States government with a mission to protect human health and the environment.[4] Since waste management is closely related to public health and the environment, the EPA is one of the governing bodies that create laws and regulations regarding "land, waste, and cleanup" of wastes or harmful substances.[5] The RCRA Act created laws and regulations that became a framework for the management of hazardous and non-hazardous solid waste in which the law describes the waste management programs mandated by Congress under the guidance of the EPA.[6] Under 42 U.S.C § 6904, States work with the EPA to administer the Federal regulations when implementing their State level rules and regulations regarding waste management.[7] At the State level, the New York State Department of Environmental Conservation (DEC)[8] and Title 6 of the New York Codes, Rules, and Regulations (NYCRR)[9] govern the laws concerning waste management in the State of New York. By extension from the Federal and State policies on waste management, Municipalities adopt a local law to accommodate the public interest of health, safety, and environmental protection.[10]

In conjunction with Federal, State, and Municipal laws, Municipal governments use a comprehensive plan to determine best practices to operate waste management facilities.[11] A comprehensive plan is "materials, written and/or graphic that are designed to provide protection, growth, and development of the town, village[12], or city." The comprehensive plan is "amongst the most important powers and duties granted by the legislature to a town government, it is the authority and responsibility to understand town

comprehensive planning and to regulate the land use to protect the public health, safety, and general welfare of citizens."[13] Comprehensive plans are one of the most important outliners in the development of a town. As stated above, comprehensive plans dictate the factors implementing, monitoring, and controlling the various projects, including placement of waste management facilities. Municipal governments have the power to manage the comprehensive plan through the powers vested in the local governments by the states. Under the Fourteenth Amendment of the United States Constitution, there is a due process of law[14] where states have an inherent "Police power" to promote safety, health, morals, public convenience, and general prosperity.[15] Since waste management is significantly related to the protection of public safety, and health, States grant Municipal governments power to utilize for overseeing the management of waste management facilities.

1. Police Power and Commerce Clause

In 1926, the United States Supreme Court made a landmark zoning and police power case in *The Village of Euclid vs Ambler Realty Co*[16]. In this case, the United States Supreme Court held for the Village of Euclid and held that the zoning and land use regulations made by the local government were constitutional.[17] In *Village of Euclid*, Ambler claimed that the Village zoning code to prohibit industrial development deprived them of liberty and property without due process. However, the court held Municipal government has the power to police zoning ordinances and regulations if it is related to the health and safety of the community.[18]Municipal governments have direct responsibility to bear the state's police power to preserve the public health, safety, morals, and general welfare of the community.[19] After the decision in the Village of Euclid, subsequent cases such as *Krause v City of Royal Oak, state ex rel. Stoyanoff v Berkeley*, and *City of Pharr v Tippitt* have all reflected the Court's holding in the Village of Euclid to hold the constitutionality Municipal zoning regulation when it has substantial relation to public health, safety, morals or general welfare.[20]

While the Police power asserts that States have an inherent interest to promote the public safety, health, morals, and general welfare, the Commerce Clause, Article I, section 8 of the United States Constitution gives Congress the power "to regulate commerce with foreign nations, and among the several states and with Indian Tribes."[21] Under the Commerce Clause, waste is interstate commerce when it travels between states to be transported or disposed of. For example, in the case of hazardous waste, the RCRA follows the Hazardous Materials Transportation Act[22] when moving the commerce of hazardous waste between states. As stated above, while the Police power grants local governments to be decision-makers of their municipality laws and regulations, the commerce clause and the Dillion's Rule invalidates the local governments outright bans and solid and hazardous waste facilities.[23] In addition to the Commerce Clause, Dillon's Rule deters local municipalities to regulate the laws regarding waste management facilities. Though, local municipalities with "home rule" have the autonomy to address matters of "local concern"[24] such as public health, safety, morals, and general welfare.

In the case of *Chemical Waste Management Inc v Hunt*, the state of Alabama imposed a fee on the hazardous waste that was generated outside of the state, but disposed of inside the state.[25] The Court acknowledged that States may impose "host fees" or "impact fees" that were charged to ameliorate the negative impact and compensate the community for risk created by waste management facilities.[26] However, the Supreme Court held that the fee imposed on hazardous waste generated outside, but disposed of inside the state was discriminatory and other less discriminatory methods could have been used to address the state's concern of the volume of hazardous waste facilities.[27] The Court in *Waste Management Inc* held that the Alabama State law imposing a fee on out of state hazardous waste that was being disposed of in state violated the Dormant Commerce Clause. The majority in this case held that waste is defined as "commerce," therefore the state of Alabama could not erect barriers that restricted the free flow of interstate trade."[28] The dissenting opinion reflected the police power and the state's interest to protect the public health and environment from the disposal of hazardous waste.[29] Hence, the dissent in Chemical Waste Management Inc question how narrow the protection of health, safety, and morals has to be declared to suppress the

Constitutional grant of police power to the state[30].

III. Examples of regulating waste through zoning

1. Designating zoning restrictions that allow waste management facilities

The City of New York and its Department of City Planning divide the city into three basic zoning districts: Residential, Commercial, and Manufacturing.[31] Manufacturing use zoning districts are areas where industrial and manufacturing activities that are essential to New York City's economy are located.[32]The Manufacturing zones are divided into three districts, M1, M2, and M3 according to the characteristics of their operations. Each district has its performance standards and limitations on the type of industrial nuisance permitted by the zone. Regardless of its different usages, all manufacturing zones must comply with the applicable Federal, State, and Municipal environmental regulations. In the City of New York, waste management facilities are designed in M3.[33] M3 districts usually include power plants, solid waste transfer facilities and recycling plants, and fuel supply depots.[34] M3 districts are usually located near waterfronts and buffered with residential areas. In comparison to NYC, smaller towns in New York such as the Town of North Hempstead separate their manufacturing and industrial zones. In the Town of North Hempstead, the Town has Industrial A and Industrial B zones that are specifically designated for industrial purposes.[35] In the Town of North Hempstead, Industrial B District permits solid waste management facilities, however, limits the usage of Industrial B zoned areas for Hazardous waste management facilities.[36]

2. Zoning to regulate waste management facilities

It is evident that residents do not wish to live near a waste management facility, however, they still must exist to process the tons of waste produced every day. As a matter of right, waste management facilities

may be permitted to operate in each zoning district. In most cases, local zoning regulations require special use permits or conditions that allow the operations of waste management facilities[37]. Municipal governments confer the Federal, State, and Municipal land use regulations to permit, reject, or grant a special use permit for the land use for waste management facilities.

In the *Town of Ellery v New York State Department of Environmental Conservation*, the court held for the DEC as it acknowledged the practical need for a waste management facility.[38] In *Town of Ellery*, the court found that the proposed waste management facility met the required findings of the environmental review process under the State Environmental Quality Review Act (SEQRA).[39] Therefore, the DEC correctly permitted the construction of a solid waste landfill as long as it was in line with the "local use character and zoning regulations into consideration and does not grant a municipality located within a county the authority to prohibit the construction or expansion of a landfill."[40]

In the *Town of Clifton Parking*, the Court had to decide whether to uphold the town zoning board's decision to not permit the development of a regional solid waste transfer facility on a property zoned for light industrial use. The Town of Clifton zoning board held that the land management company cannot develop a waste transfer station in the light industrial use zone because the use did not fall within any permitted use outlined in the town zoning code.[41] The Town of Clifton Parking Zoning Code § 208–62 states that "the primary purpose of the Light Industrial District LI is to permit light manufacturing, processing, assembly and fabrication facilities, wholesale warehouses and storage facilities and research, development and laboratory facilities. This district is primarily for selective industries whose activities do not adversely impact the environment or quality of life of the residents of the town or create an impact which is injurious to the public health, safety or general welfare of the residents or property owners of the Town of Clifton Park. Accordingly, due to the potential adverse and/or harmful impact of heavy industrial uses, such uses are explicitly excluded from this district."[42] As seen in the ordinance above, the intended use by the land management company does not fall within the permitted use according to the ordinance. However,

according to the town code § 208–64, the intended use also does not fall within the 29 prohibited uses stated in the town legislation.[43] The Court had to decide whether both the inclusion and exclusion of waste transfer stations completely precluded the land use as a waste transfer station. The Court held in *Iza Land Management Inc v Town of Clifton Parking Zoning Board of Appeals*, that the ZBA made the decision in the interest of "public health, safety or general welfare of its residents or property owners" according to the Town of Clifton Park Zoning Code § 208–62. Therefore, the Court held for the ZBA's police power to ensure the security of its town.[44]

In contrast to the Town ordinance in the Town of Clifton Parking, the Town of LaGrange included in Chapter 103 of their General Legislation that Dumps and Dumping are "useful and necessary, despite the unsatisfied and unhealthy conditions"[45] that it may pose. Therefore, the community will exercise well-regulated procedures and exercise its police power to attend to the regulation of the waste management facilities.[46] However similar to the holding for the Town of Clifton Parking, the court in the *Town of LaGrange v Giovennetti Enterprises, Inc* held that any land use outside the permitted use of the Town Zoning ordinance is not a permitted use and an injunctive relief can be granted to stop the non-conforming usage.[47] In this case, the Town of LaGrange permitted Giovennetti Enterprises Inc to operate a waste transfer station, however, the enterprise violated the zoning ordinance by storing waste, thereby violating the agreed parameters to operate the waste transfer station.[48] As a result, the Court held that the town planning board was appropriate in applying the Town Law § 274–a in delegating the power to recommend approval, modification, and denial of a site plan application.[49] The town was using its police powers to reasonably protect the "public health safety morals or general welfare" of the people of the Town of LaGrange.[50]

As seen in the cases above, laws regulating land use for waste management facilities significantly involve inter-agency coordination at the Federal, State, and Municipal levels. While police power granted to State and Municipal governments provide autonomy to advocate for local interest, it is also evident that

regulations and guidelines from federal organizations such as the EPA prevail. This is especially true considering regulations related to hazardous waste management due to its highly toxic and volatile characteristics.

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[1] Shortlidge, Neil R., and S. Mark White. "The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities." *Natural Resources & Environment* 7, no. 3 (1993): 5.
[2] United States Environmental Protection Agency, Resource Conservation and Recovery Act (TCRA) Laws and Regulation, *available at* https://www.epa.gov/rcra
[3] https://www.epa.gov/regulatory-information-topic/regulatory-information-topic-waste
[4] United States Environmental Protection Agency, About EPA, *available at* https://www.epa.gov/aboutepa
[5] United States Environmental Protection Agency, Land, Waste, and Cleanup Topics, *available at* https://www.epa.gov/environmental-topics/land-waste-and-cleanup-topics
[6] United States Environmental Protection Agency, Resource Conservation and Recovery Act (TCRA) Laws and Regulation, *available at* https://www.epa.gov/rcra
[7] 42 U.S.C § 6904
[8] New York State Department of Environmental Conservation, *available at* https://www.dec.ny.gov/index.html
[9] Title 6 Of the New York Codes, Rules, and Regulations (NYCRR)
[10] Consolidated Laws, General Municipal, Article 6: Public Health and Safety, Section 120-AA, New York Senate.
[11] New York City Council, Planning Together: A New Comprehensive Planning Framework for New York City, (2020), *available at* https://council.nyc.gov/news/2020/12/16/planning-together/
[12] Consolidated Laws, Village, Article7: Building Zones, Section 7-724: Village Comprehensive Plan, New York Senate.
[13] Consolidated Laws, Town, Article 16: Zoning and Planning, Section 272-A Town Comprehensive Plan, New York Senate.
[14] United States Constitution, Fourteenth Amendment
[15] United States Constitution, Tenth Amendment
[16] *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926), 387.
[17] *Id.*
[18] *Id.*
[19] Jinhui Lieu et al, The Impact of Consumption Patterns on the Generation of Municipal Solid Waste in China: Evidence from Provincial Data," International journal of environmental research and public health vol. 16,10 1717. (2019)
[20] *Krause v. City of Royal Oak*, 11 Mich. App. 183, 160 N.W.2d 769 (Mich. Ct. App. 1968), *State ex Rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970), *City of Pharr v. Tippitt*, 616 S.W.2d 173 (Tex. 1981)
[21] U.S. Const. art. I, § 8
[22] 49 U.S.C § 1801
[23] Shortlidge, Neil R., and S. Mark White. "The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities." *Natural Resources & Environment* 7, no. 3 (1993): 45.
[24] *Id.*

[25]Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992).
[26] Shortlidge, Neil R., and S. Mark White. "The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities." *Natural Resources & Environment* 7, no. 3 (1993): 44
[27] *Id.*
[28] Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992).
[29] *Id.*
[30] "State Police Power under the Commerce Clause." *Columbia Law Review* 9, no. 1 (1909): 66-68
[31] Land Use, Zoning and Public Policy, CEQR Technical Manual, (2014).
[32] Department of City Planning, Manufacturing District: Overview.
[33] Department of City Planning, Manufacturing District: M3
[34] *Id*
[35] Town of North Hempstead (NY), The Code, Zoning, Article XIX Industrial A District §70-171 Application of provisions, *see* https://ecode360.com/9301045
[36] Town of North Hempstead (NY), The Code, Zoning, Article XX Industrial B District §70-185 Permitted and prohibited uses, *see* https://ecode360.com/9301247
[37] Shortlidge, Neil R., and S. Mark White. "The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities." *Natural Resources & Environment* 7, no. 3 (1993): 5.
[38] Town of Ellery v. N.Y. State Dept. of Envtl. Conservation, 2017 N.Y. Slip Op. 91254 (N.Y. App. Div. 2017)
[39] *Id.*
[40] McKinney's County Law § 226 Solid waste management; resource recovery
[41] Iza Land Management, Inc. v. Town of Clifton Park Zoning Board of Appeals, 262 A.D.2d 760 (N.Y. App. Div. 1999)
[42] Town of Clifton Park (NY), Zoning, Article IX Light Industrial Districts LI §208-62 Purpose *see* https://ecode360.com/6715462
[43] Town of Clifton Park (NY), Zoning, Article IX Light Industrial Districts LI §208-63 Permitted and prohibited uses, *see* https://ecode360.com/6715462
[44] Iza Land Management, Inc. v. Town of Clifton Park Zoning Board of Appeals, 262 A.D.2d 760 (N.Y. App. Div. 1999)
[45] Town of LaGrange (NY), Chapter 103 Dumps and Dumping §103-2 Applicability, *see* https://ecode360.com/6410320#6410320
[46] Town of LaGrange (NY), Chapter 103 Dumps and Dumping §103-1 Declaration of findings, *see* https://ecode360.com/6410320#6410320
[47] Town of LaGrange v. Giovenetti Enterprises, 123 A.D.2d 688 (N.Y. App. Div. 1986)
[48] *Id.*
[49] McKinney's Town Law § 274-a. Site plan review
[50] Town of LaGrange v. Giovenetti Enterprises, 123 A.D.2d 688 (N.Y. App. Div. 1986)
[51] 6 NYCRR Part 371, Section 371.1(d). The Official Compilation of Codes Rules and Regulations of the State of New York.
[52] 40 C.F.R. §261.3.
[53] United States Environmental Protection Agency, *Hazardous waste generators, available at https://www.epa.gov/hwgenerators*
[54] 42 U.S.C.A. §§6901 to 6987.
[55] Town of LaGrange (NY), Zoning, Article XIII Medical and Hazardous Waste Facilities §240-60

Regulated Use, *see* https://ecode360.com/6500303

[56][56] Town of LaGrange (NY), Zoning, Article XIII Medical and Hazardous Waste Facilities §240-62 Facility Requirements, *see* https://ecode360.com/6501590

[57] Consolidated Laws, Town, Article 16: Zoning and Planning, Section 272-A Town Comprehensive Plan, New York Senate.

[58] Town of LaGrange (NY), Zoning, Article XIII Medical and Hazardous Waste Facilities §240-62 Facility Requirements, *see* https://ecode360.com/6501590

[59] Anderson's American Law of Zoning § 6.01, at 481-482.

[60] Glacial Aggregates LLC v. Town of Yorkshire, 14 N.Y.3d 127, 135 (2010), People v. Miller, 304 N.Y. 105, 107 (1952).

[61] Pelham Esplanade v. Board of Trustees of Village of Pelham Manor, 77 N.Y.2d 66, 72 (1990).

[62] Consolidated Laws, Town, Article 16: Zoning and Planning, Section 274-B Approval of special use permits, New York Senate.

[63] *Id*

[64] Consolidated Laws, Village, Article 7: Building Zones, Section 7-725-B Approval of special use permits, New York Senate.

[65] New York State Department of State, Zoning Enforcement Officer, *available at* https://www.dos.ny.gov/lg/publications/Zoning_Enforcement.pdf

[66] Town of Lewiston (NY), Zoning, Article XXI Special Use Permits §360-153 Waste Disposal, recycling, and landfill facilities, *see* https://ecode360.com/27710921

[67] Town of Clarence (NY), General Legislation, Chapter 123 Industrial Hazardous Waste, *see* https://ecode360.com/10544106

[68] Town of East Hampton (NY), Zoning, Article V Special Use Permits §255-5-38 General Standards, *see* https://ecode360.com/10414858

[69] Village of Croton-on-Hudson, (NY) Zoning Code, Chapter 230 Zoning, *see* https://ecode360.com/9145071

[70] Greentree v. Croton-On-Hudson, 46 A.D.3d 511 (N.Y. App. Div. 2007)

[71] *Id, 513.*

[72] Babylon Town Code §213-226 (Nonconforming use lost if discontinued for a period of six months); Hempstead Building Zone Ordinance § 5 (nonconforming use lost on "abandonment"); North Hempstead Town Code §70-208 (E) (Nonconforming use lost if discontinued for a period of one year); Oyster Bay Town Code § 246-4.2.2.5 (Nonconforming use lost if discontinued for a period of one year).

[73] Metro v. Croton-On-Hudson, 5 N.Y.3d 236 (N.Y. 2005)

[74] *Id.*

[75]Establishing, Maintaining, and Expanding Nonconforming Uses, Nassau County Bar Association,

[76]Jones v. Town of Carroll, 15 N.Y.3d 139, 144.

[77] Matter of Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000 (N.Y. 1997)

[78] Bohner v. Casatelli, 38 A.D.3d 1230 (N.Y. App. Div. 2007)

[79] Town of Newport (NY) Zoning Code Article II § 3 Definitions, *see https://townnewport.digitaltowpath.org:10794/content/Generic/View/3:field=documents;/content/Documents/File/354.pdfhttps://townnewport.digitaltowpath.org:10794/content/Generic/View/3:field=documents;/content/Documents/File/354.pdf*

[80] Bohner v. Casatelli, 38 A.D.3d 1230 (N.Y. App. Div. 2007)

The Smarter ESG Reporting Guide:

How to automate data collection

INTRO

Proactively managing ESG

To what extent does a company mitigate its environmental impact? How committed is it to diversity? Is it transparent about its impact on society? With the rise of environmental, social, and governance (ESG) regulations, it is important for organizations to have data-backed answers to these questions and more.

ESG is an umbrella term encompassing sustainable and responsible corporate practices and the ways of measuring their impact. It establishes a framework that considers environmental, social, and corporate governance factors alongside financial factors, which can be used by business partners to evaluate relationships, investors to analyze their investments, and regulators to determine compliance with regulations.

The three categories of ESG are:

- **Environmental criteria**, which denote the impact an organization has on climate, emissions, pollution, and other factors affecting the environment.
- **Social criteria**, which examine the company's relationships with its employees, customers, suppliers, and community. This may include employees' working conditions, health and safety, diversity in hiring practices, gender equality, and stances on human rights issues and politics.
- **Governance criteria**, which deal with a company's leadership, executive pay, board diversity, internal controls, audits, data protection, measures against bribery and corruption, and shareholder rights. Investors want this information to help them evaluate whether they can trust the company, the decisions it makes, and how and by whom those decisions are made.

As pressures around ESG have increased, many companies have already strongly felt the impact. Governments, customers, investors, and employees call upon businesses to respond to ESG imperatives, participate in the movement, and comply with the regulations allowing companies to claim ESG adherence through public reports.

Because of the sudden arrival of ESG standards, asset managers, sustainability officers, human resource officials and others tasked with their company's response have developed inefficient band-aid solutions for collecting the data they need to report to stakeholders. These companies now face a few widespread challenges: collecting the relevant data across departments and systems; analyzing data ahead of deadlines, often with significant manual effort; and complying with new and rapidly changing regulations and societal pressures.

In this guide, we'll show you how to keep up with ESG and manage it proactively. We'll start with an overview of the current challenges presented by ESG, outline current regulations by geography, and then share a practical, manageable, and technology-driven approach to ESG data collection and reporting.

[Chapter 1] What challenges does ESG reporting present?

Around the world, companies are under growing pressure to engage with and adopt a strategy for ESG. In terms of international treaties, the 2016 Paris Agreement, the UN's 2030 Sustainable Development Goals, and the 2021 Glasgow Climate Pact signal a growing international pressure to curb further climate change. Societally, the "Fridays for Future" protests and Extinction Rebellion movement are encouraging open discussion on the environment and galvanizing corporate action. At the same time, the COVID-19 pandemic has highlighted societal inequalities and humanity's impact on environment factors such as air quality.

These trends have accelerated a shift in stakeholder sentiment, with ESG now a key priority for regulators, investors, consumers, and employees. ESG investing, for instance, surged in 2020, reaching a record high of over $1 trillion in total assets invested in ESG-specific products. In some cases, asset managers are divesting from companies in their portfolios for violating their ESG standards. 64% of Millennial employees consider companies' social and environmental commitments when deciding where to work, and customers are boycotting companies whose values they disagree with, with one recent study finding that 59% of consumers intend to start boycotting brands that don't take action on climate change.

The business impacts of ESG

Companies

Corporates are beginning to consider how to measure and describe their operations in ESG terms, and legislatures are introducing mandatory ESG disclosure rules. From this, a problem arises for businesses: how to accurately gather, evaluate, and report on ESG data.

Because of the sudden arrival, and constant change, of ESG standards, and the lack of software to support collection and reporting, companies often manually generate ESG reports for different stakeholders (e.g., investors, shareholders, regulators, internal use). This quickly becomes a time-intensive and tedious task. Such reports must also be updated and distributed regularly. Additionally, companies often collect and maintain all ESG data in large, difficult-to-navigate Excel sheets. While essential in the absence of software, relying on these manual processes is an inefficient use of time and resources, increases the risk of human error, and often means that risks are identified too late.

Gathering and evaluating social data is particularly challenging, with data like employment metrics, ethical supply chain systems, product liability, and workers' safety proving difficult to measure consistently. Additionally, companies need to be very careful about how they collect and store sensitive personal data related to demographics like gender, sexuality, and ethnicity, which are essential to some ESG issues, but subject to additional regulation and personal sensitivity.

Investors

Just as corporates are struggling with pools of data and unstandardized reporting metrics, asset managers are struggling to identify which companies truly comport with ESG standards and which are misrepresenting their efforts. Greenwashing, for example, is when an organization uses marketing and public relations to deceive the public about the extent of their environmental efforts. Ratings are only as good as the quality of the data used to calculate them, and the lack of standards means ratings are often subjective, varying from one industry to the next. Stakeholders cannot

merely rely on the ratings provided by ratings firms or the statements of companies alone. Regulations are being introduced to curb misrepresentation of ESG efforts, as discussed further in the next chapter.

Professional Service Providers

The fast-moving ESG landscape brings about opportunities for legal advisors, such as the chance to partner with organizations to achieve commendable business outcomes, but it also poses an important challenge. They must ensure that clients meet all pre-existing mandatory and recommended ESG disclosure requirements, while simultaneously monitoring and preparing for new legislative proposals from across the world.

The risks of non-compliance

Failure to comply with ESG requirements results in substantial litigation risk, such as investors suing for greenwashing, or employees bringing claims for discrimination or breach of health and safety regulations. Non-compliance with the EU General Data Protection Regulation (GDPR), for example, can result in a fine of up to €20 million, or 4% of the firm's worldwide annual revenue from the preceding fiscal year – whichever is higher.

There has also been an increase in shareholder activism for ESG topics, as exemplified by the success of a 2021 alliance of hedge funds in installing new directors on Exxon's board with the goal of reducing the company's carbon footprint. Beyond these immediate stakeholders, environmental groups are increasingly likely to levy climate-related legal action against businesses.

Further hidden consequences of non-compliance include reputational damage, inability to attract desired investment, difficulty hiring, and the risk of falling behind competition with better-defined ESG strategy and execution.

[Chapter 2] Current ESG regulations by geography

ESG regulations vary by country, and staying informed of — and compliant across — regional differences is critical for companies that do business internationally, as well as for the law firms that service them. The sections below summarize the relevant ESG regulations that are already in effect, planned to be in effect, or have been proposed in different regions, as of 2022.

The European Union

The EU has raced ahead with an ambitious strategy to make ESG a central part of its financial services industry.

Sustainable Finance Disclosure Regulation

The Sustainable Finance Disclosure Regulation (SFDR) is a set of sustainability disclosure obligations for asset managers and other financial markets participants, intended to increase clarity and transparency about the sustainability risks of their products and services. The SFDR aims to balance financial markets participants' capability to pursue financial growth while also combatting greenwashing. Its main provisions (Level 1) have applied since March 2021 with Level 2 in effect from July 2022 onward.

Compliance with SFDR regulations will be a challenge for asset managers and other market participants, as accessing ESG data and complying with complex disclosure requirements are resource-intensive tasks. Failure to comply with the SFDR will result in administrative sanctions or fines that will vary depending on the individual member states' regulations. For larger firms, the

challenge primarily lies in gathering and assessing the enormous amounts of data needed to determine compliance. For smaller organizations, the challenge can be a lack of dedicated staff and a relatively larger cost of maintaining compliance due to economies of scale.

Despite the associated costs, the SFDR marks a positive and welcomed change for end-investors by simplifying how they make informed sustainable investment decisions.

Taxonomy Regulation (in force since January 2022)

To provide companies, investors, and policymakers with a shared understanding of environmentally sustainable activities, the EU has established a classification system, the EU Taxonomy. Over 550 pages long, this taxonomy has been in force since January 2022, allowing market participants to invest in sustainable assets with greater confidence.

The EU Taxonomy Regulation includes mandatory requirements on disclosure for companies (both financial and non-financial) and market participants like asset managers alike. Companies must disclose to what extent they meet the criteria laid out in the Taxonomy, and financial market participants must disclose the extent to which their financial products meet the same criteria.

Corporate Sustainability Reporting Directive (proposal)

The CSRD will amend the existing Non-Financial Reporting Directive so that more companies will be affected (49,000 instead of the current 11,600) and more detailed disclosure of the extent to which their activities are sustainable will be required. This will support the overarching European Green Deal, which aims to make the EU a net-zero greenhouse gas emitter by 2050. The Commission plans to adopt the CSRD by the end of 2022.

Supply Chain Directive (proposal)

The EU Parliament has drafted a resolution with recommendations for the Commission to introduce mandatory human rights, environmental and governance due diligence across an organization's value chain. This follows individual Member State legislation aiming to combat modern slavery and human trafficking, most recently Germany's 2021 *Lieferkettengesetz*.

Green Bond Standard (proposal)

The Green Bond Standard is a proposal to introduce a voluntary framework aiming to set a 'gold standard' for how companies and public authorities can use green bonds to raise funds on capital markets while complying with sustainability requirements and protecting investors.

The United States

The US has traditionally relied on voluntary, private-sector-led ESG guidelines, where compliance was driven by market competition and stakeholder engagement. Since the beginning of the Biden administration, ESG has become a greater priority for policy makers.

Enhanced climate risk disclosure requirements (proposal)

SEC chair Gary Gensler has signalled commitment to mandatory climate-related disclosure rules for public companies, including enough detail for investors to obtain consistent, "decision-useful" information on the climate risk of companies they may invest in.

Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (proposal)